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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID DUFFIN,

Petitioner,

21IWCC0001

vs.

NO: 16 WC 17104 & 17 WC 873

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Arbitrator found that Petitioner sustained his burden of proving that stipulated accidents on April 13, 2016 and December 15, 2016 caused a current condition of ill-being of his cervical spine. He awarded Petitioner 139.714 weeks of TTD, outstanding medical bills, ordered Respondent to authorize and pay for prospective C3-7 fusion surgery, and assessed penalties and fees pursuant to Sections 19(k), 19(l), and 16. The Commission agrees with these aspects of the Decision of the Arbitrator and affirms and adopts that portion of the decision.

In the Request for Hearing form (stip sheet), Petitioner alleged he was entitled to TTD for 139&6/7 weeks. Respondent countered by alleging that if the accidents caused Petitioner's condition of ill-being, he was entitled to only 99&3/7 weeks. Respondent also alleged that it paid TTD amounting to $126,880.80 representing payment for that period of time. Petitioner's lawyer neither indicated that he agreed nor disagreed with that assertion by Respondent. Respondent also submitted evidence showing that it actually paid Petitioner $126,880.80 in TTD benefits.

Interestingly, the Arbitrator assessed penalties for non-payment of TTD based on the failure to pay after December 7, 2018, the last date Respondent asserted it paid TTD. However, even though the Arbitrator acknowledged that Respondent paid TTD through that date, he did not award credit for such payment. He did not award credit for the TTD actually paid nor did he include the catchall provision that Respondent shall be given credit for all benefits paid resulting from the accidents. In the interest of clarity, the Commission awards Respondent credit for all benefits it paid, including $126,880.80 in TTD.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,276.10 per week for a period of 139.714 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 all outstanding medical expenses incurred to treat Petitioner's work-related cervical condition of ill-being under §8(a) of the Act, subject to the applicable medical fee schedule in §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for C3-7 fusion surgery prescribed by Dr. Lim, including associated medical treatment.

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. Specifically, Respondent is awarded credit in the amount of $126,880.80 for TTD paid.

21IWCC0001

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: JAN 4 - 2021

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/dw
O-11/19/20
46

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

21IWCC0001

DUFFIN, DAVID
Employee/Petitioner

Case# **17WC000873**

16WC017104

CITY OF CHICAGO
Employer/Respondent

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% 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:

0391 HEALY SCANLON LAW FIRM
DAVID P HUBER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO
LUCY HUANG
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
19(B) / 8A

DAVID DUFFIN
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **17 WC 873**

Consolidated cases: **16 WC 17104**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts,** Arbitrator of the Commission, in the city of **Chicago**, on **September 16, 2019 and December 6, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On ***April 13, 2016 and December 15, 2016***, Respondent ***was*** operating under and subject to the provisions of the Act.

On ***April 13, 2016 and December 15, 2016***, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On ***April 13, 2016 and December 15, 2016***, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of both ***April 13, 2016 and December 15, 2016*** accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accidents of ***April 13, 2016 and December 15, 2016.***

In the year preceding the injuries, Petitioner earned ***$99,530.84***; the average weekly wage was ***$1,914.05.***

On the date of accidents, Petitioner was ***49*** 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 pay Petitioner TTD benefits from ***January 11, 2017*** through ***September 16, 2019*** (139.714 weeks at $1,276.10) for a total of $178,289.04.

Respondent shall pay the unpaid medical bills contained in Petitioner's Exhibits 2-4, including
Midwest Orthopedic Consultants, PEX2, 10/16/2018-1/15/2019, $252.00;
Advocate Christ Medical Center, PEX3, 12/16/2016-2/20/2017, $7,341.88;
Midwest Anesthesiologists, SC, PEX 4, 3/5/2018 & 5/17/2018, $2,200.00

Respondent shall authorize and pay for prescribed C3-7 fusion, including physical therapy and rehabilitation, as recommended by Petitioner's treating physician, Dr. Richard Lim.

ORDER :

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the April 13, 2016 and December 15, 2016 work injuries.

The Arbitrator finds that Respondent shall pay TTD benefits in the amount of $178,289.04 representing 139.714 weeks at 1,276.10/week.

The Arbitrator finds that Petitioner is entitled to penalties in the amount of $25,886.60 pursuant to Section 19(k), $10,000 pursuant to Section 19(l), and $10,000 in attorneys' fees pursuant to Section 16 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.

Charles W Watte

April 8, 2020

Signature of Arbitrator Date

APR 14 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION OF ILLINOIS

DAVID DUFFIN	)	
Petitioner,	)	**No. 16 WC 017104**
	)	**No. 17 WC 000873**
v.	)	**Arbitrator Charles Watts**
	)	
CITY OF CHICAGO	)	
Respondent.	)	

MEMORANDUM OF DECISION OF ARBITRATOR

This matter is presented for hearing on Petitioner's Motions pursuant to Sections 19(b) and 8(a) of the Act. Petitioner filed his motion seeking Attorney's fees and penalties pursuant to Sections 16 & 19 of the Act.

FINDINGS OF FACT

Petitioner's Work for Respondent

On April 13, 2016, Petitioner was a 52-year-old right hand dominant Local 150 hoisting engineer employed by Respondent in the Streets and Sanitation Department. Petitioner's employment began in 1986.

Petitioner testified that his duties as a hoisting engineer were to maintain and operate heavy equipment. Petitioner testified that his daily maintenance responsibilities included lubricating and fueling the machines, which required Petitioner to climb on top of machines, climb under machines, climb stairs, and move around machines.

Arbitrator's Exhibit #1 is an Illinois Workers Compensation Commission Request for Hearing form. Petitioner testified that in the year proceeding his injury he earned approximately $99,530.84 and that his average weekly wage was about $1,914.05 a week by April 2016, as stipulated by the parties in paragraph 5 of Arbitrator's Exhibit #1.

Petitioner's April 13, 2016 Injury

Petitioner has two dates of accident. On April 13, 2016, Petitioner was injured while operating a backhoe at work. Petitioner returned to work full duty while treating for this injury. However, on December 15, 2016, Petitioner sustained a second injury while lifting a propane tank at work.

Petitioner had a previous low back injury, which required Petitioner to undergo a lumbar fusion. Petitioner was cleared to return to work full duty by Dr. Richard Lim on February 24, 2014. Petitioner returned to work full duty in February 2014. Petitioner testified that he had no issues performing his full duties as a hoisting engineer from February 2014 to April 2016.

Petitioner testified that prior to April 2016 he had never made any complaints to any physician about problems with his neck and no medical professional had ever treated his neck for injuries or given him work restrictions related to his neck.

On April 13, 2016 Petitioner was driving a backhoe out of the yard at 900 East 103rd Street to fuel it. Petitioner testified that there are speed bumps outside the yard and because it was a forestry yard, the ground is covered in chips and is difficult to see things on the ground. Petitioner testified that he hit a speed bump with the backhoe, and because he did not see the bump before he hit it, the force of hitting the bump threw him around in the cab of the backhoe.

Petitioner testified that he noticed pain in his neck after he hit the speed bump and that he had never experienced that kind of pain in his neck prior to hitting the bump. He reported the incident to his supervisor and foreman, Larry McDermott, and filled out a written accident report.

Petitioner's Medical Treatment

a. MercyWorks

Petitioner testified that following the occurrence, his supervisor, Mr. McDermott, instructed him to appear at MercyWorks. Petitioner complied and reported to MercyWorks on the day of the incident, April 13, 2016. PEX 1, pg. 2. Dr. Steven Anderson diagnosed Petitioner with a cervical strain and recommended he ice his neck, return to work full duty, and follow up on April 20, 2016. PEX 1, pg. 3. Petitioner followed up with Dr. Anderson at MercyWorks on April 20, 2016 and reported neck pain with movement, headaches, and problems sleeping. PEX 1, pg. 3. Petitioner spoke to Dr. Anderson at MercyWorks about seeing his spinal orthopedic surgeon, Dr. Richard Lim, about his neck. PEX 1, pg. 3. Dr. Anderson returned Petitioner to full duty work and discharged him from MercyWorks's care. PEX 1, pg. 3.

b. Dr. Richard Lim at Midwest Orthopedic Consultants

Petitioner saw Dr. Richard Lim at Midwest Orthopedic Consultants on July 12, 2016. Petitioner knew Dr. Lim because he performed a lumbar fusion on Petitioner in 2014. On July 12, 2016, Petitioner reported that he had left-sided neck pain, loss of motion, and stiffness. PEX 2, pg. 26. Petitioner further reported that while he had been working full time since the April injury, he could no longer tolerate the pain in his neck. PEX 2, pg. 26. Dr. Lim diagnosed Petitioner with an aggravation of pre-existing cervical disc degeneration at C5-6, C6-7 and prescribed Petitioner Flexeril, Norco, topical pain cream, and a course of physical therapy. PEX 2, pg. 26. Petitioner testified that he attended physical therapy August 4 through November 6, 2016.

Petitioner followed up with Dr. Lim on December 13, 2016, and reported that he could not move his neck. PEX 2, pg. 30. Dr. Lim recorded that Petitioner experienced a significant loss of motion and concerning weakness in his right arm accompanied by numbness and tingling. PEX 2,

pg. 30. Dr. Lim determined that conservative treatment was not working and ordered an MRI of Petitioner's cervical spine. PEX 2, pg. 30-32.

c. Petitioner's December 15, 2016 Injury and Medical Treatment at Advocate Christ Medical Center

Petitioner testified that as a part of his job duties he was required to replace propane tanks that fuel the forklifts he operates. On December 15, 2016, Petitioner was attaching a full propane tank—which weighs about 40 to 45 pounds—to a forklift when he experienced a popping sensation in his neck and worsening pain.

On December 16, 2016, Petitioner went to Advocate Christ Medical Center and reported the popping sensation in his neck and 10 out of 10 left-sided neck pain, which progressively worsened after the propane tank incident. PEX 3, pg. 28. Petitioner testified that he went to Advocate Christ Hospital at that point because his pain was a 10 out of 10 and he could not move his neck at all. Petitioner also stated that he could not sleep the night of the incident due to the severity of the pain and that neither heating blankets nor Norco diminished the pain. PEX 3, pg. 27-28. Petitioner was discharged with a prescription for Norco and instructions to see Dr. Lim. PEX 3, pg. 30.

d. Dr. Richard Lim

Petitioner testified that he underwent an MRI of his neck on December 20, 2016. Petitioner reported to Dr. Lim on January 1, 2017 to review the results of the MRI. PEX 2, pg. 33. Dr. Lim diagnosed Petitioner with several disc herniations, most notably at C3-C4 and C6-C7, resulting in severe spinal stenosis and spinal cord compression. PEX 2, pg. 34. Dr. Lim opined at this time that Petitioner's condition would ultimately require surgical intervention and recommended a transforaminal epidural steroid injection. PEX 2, pg. 34.

Petitioner returned to Dr. Lim on April 4, 2017 and reported that the epidural had not been approved by Respondent's workers' compensation claims handler. PEX 2, pg. 38. Dr. Lim reported at this point that Petitioner was "0% better since the last visit" and Petitioner had no change in the character or location of the injury. PEX 2, pg. 38. Dr. Lim opined that Petitioner's symptoms persisted because treatment was being withheld and that an epidural injection was medically necessary to treat Petitioner's condition. PEX 2, pg. 39.

Petitioner underwent an epidural steroid injection on July 28, 2017. PEX 3, pg. 165. On August 29, 2017, Petitioner followed up with Dr. Lim and reported that the epidural injection helped relieve some of his discomfort in his neck and upper right extremity. PEX 2, pg. 41. Dr. Lim ordered a second cervical injection and physical therapy. PEX 2, pg. 42-43.

On December 10, 2017, Petitioner was seen and treated for cellulitis in his left hand at Palos Hospital. PEX 7, pg. 5-7, 16. Petitioner followed up with Dr. James Tess on December 13, 2017 and Dr. Claudia Vergara on January 4, 2018. PEX 8, pg. 2-4 & PEX 9, pg. 2-4.

On February 13, 2018, Petitioner returned to see Dr. Lim and requested a second prescription for an epidural injection because Petitioner's injection was cancelled due to his cellulitis and the former prescription had expired. PEX 2, pg. 46. Dr. Lim ordered a second epidural injection. PEX 2, pg. 47. Petitioner returned to Dr. Lim on April 27, 2018 and reported that the second injection on March 5, 2018, relieved some of Petitioner's symptoms but not all of the pain. PEX 2, pg. 48. Dr. Lim recommended and ordered a third and final epidural injection, which was performed on May 17, 2018. PEX 2, pg. 49. Petitioner followed up with Dr. Lim on June 8, 2018 and reported limited improvement following his injection. PEX 2, pg. 50-51. Dr. Lim recommended physical therapy, another MRI, and kept Petitioner off of work. PEX 2, pg. 51.

On July 6, 2018, Petitioner followed up with Dr. Lim and indicated an MRI had not been performed because it was not approved by his insurance. PEX 2, pg. 52. Dr. Lim opined that Petitioner had not improved since his last visit and that "[c]ontinue[d] delay [of] further diagnostics may result in permanent damage associated with the disc herniation from his work-related injury." PEX 2, pg. 53. Dr. Lim ordered that Petitioner off of work until an MRI was completed and ordered Petitioner to follow up once the MRI was completed. PEX 2, pg. 53.

Petitioner underwent an MRI on August 10, 2018 at Chicago Ridge Medical Imaging. PEX 2, pg. 93-95. The MRI showed diffuse broad-based disc bulge-osteophyte complex at C5-6, resulting in mild spinal cord stenosis and moderate to severe bilateral neural foramen stenosis causing impingement of nerve roots. PEX 2, pg. 93. The MRI further showed broad-based disc bulges at C6-7, resulting in mild spinal canal stenosis and mild to moderate bilateral neural foramen stenosis causing impingement on nerve roots. PEX 2, pg. 93. The MRI also showed central and diffuse broad based disc bulges at C3-4, resulting in mild spinal canal stenosis and mild bilateral neural foramen stenosis causing impingement of nerve roots. PEX 2, pg. 93.

Petitioner reported to Dr. Lim on September 4, 2018. PEX 2, pg. 54. Dr. Lim stated that Petitioner had not improved at all since his last visit, presenting with radiculopathy and significant functional limitations, including the inability to look left or up. PEX 2, pg. 54. Dr. Lim noted that Petitioner's MRI showed no significant change from the 2016 MRI; Petitioner has significant stenosis with abutment on the spinal cord. PEX 2, pg. 55. Dr. Lim opined that Petitioner has a "high risk of neurologic catastrophe should he have an injury slip [or] fall." PEX 2, pg. 55. Because of this risk and his limited range of motion, Dr. Lim indicated Petitioner could not return to work as a heavy equipment operator but stated that Petitioner could return to work in a sedentary duty job, where there is no risk of slipping and falling. PEX 2, pg. 55.

On October 16, 2018, Petitioner followed up with Dr. Lim and reported constant 6 out of 10 neck pain and occipital headaches. PEX 2, pg. 57. Dr. Lim recommended Petitioner undergo a posterior anterior cervical discectomy and fusion on C3-4, C4-5, C5-6 and C6-7. PEX 2, pg. 57-58. However, Dr. Lim recommended Petitioner lose weight prior to surgical intervention, so he was told to return in three months. PEX 2, pg. 57-58.

On January 15, 2019, Petitioner followed up with Dr. Lim and reported that his symptoms had worsened and his pain was 10 out of 10. PEX 2, pg. 60. Dr. Lim stated that Petitioner had severe progressive neck pain and bilateral upper extremity pain and weakness. PEX 2, pg. 60. Dr. Lim reviewed Respondent's § 12 Examiner, Dr. Daniel Troy's, report and stated that he disagreed with Dr. Troy's report that Petitioner has mild stenosis. PEX 2, pg. 60. Dr. Lim stated that because Petitioner has less than 8 mm anterior posterior canal diameter, he qualifies as having severe stenosis. PEX 2, pg. 60-61. Dr. Lim again recommended surgery and prescribed Petitioner Tylenol-Codeine to alleviate his pain symptoms. PEX 2, pg. 61. Petitioner testified that he has not seen Dr. Lim since the January 15, 2019 visit.

e. Dr. Yaw N. Dokoh, MD at Midwest Anesthesiologists, Ltd.

As recommended by Dr. Lim, Petitioner testified that he underwent three cervical epidural steroid injections. Dr. Yaw Dokoh performed an epidural injection via T1-2 on Petitioner on July 28, 2017. PEX 3, pg. 165. Plaintiff also underwent epidural injections via C7-T1 on March 5, 2018 and May 17, 2018. PEX 4, pg. 6-12.

Petitioner's Unpaid Medical Bills

It appears that Respondent has paid for some of Petitioner's medical bills while Petitioner's group health insurance has paid for others. REX 2 & PEX 2-5.

Dr. Richard Lim's Evidence Deposition

Dr. Richard Lim testified via evidence deposition on May 7, 2019. Dr. Lim's deposition is PEX 6. Dr. Lim is Petitioner's treating orthopedic surgeon. Dr. Lim is a board-certified physician in orthopedics and practices primarily on the spine. PEX 6, pg. 5 & 20. Dr. Lim estimated he treats about 150 patients per week and about 30 percent have cervical issues, meaning Dr. Lim treats about 45 patients per week who suffer from cervical spine issues. PEX 6, pg. 20-21. Dr. Lim treated Petitioner for his former lower back issues and returned Petitioner back to work with no restrictions after his low back fusion on February 24, 2014. PEX 6, pg.5-7.

Petitioner did not come under Dr. Lim's care again until July 12, 2019, when he saw Petitioner for neck pain following his first cervical injury. PEX 6, pg. 7. Prior to July 12, 2016, Dr. Lim had never treated Petitioner's neck, never put work restrictions on Petitioner for his neck, never discussed surgery with Petitioner regarding his neck, and never heard Petitioner voice any persistent complaints of neck symptoms interfering with his ability to go about his daily activities or work. PEX 6, pg. 7-8.

Dr. Lim first saw Petitioner for neck pain on July 12, 2016 and testified that Petitioner sustained an injury at work on April 13, 2016, when he was operating a backhoe and hit a speed bump, jarring his neck. PEX 6, pg. 8-9. Based on Petitioner's neck pain, 50 percent loss of motion, and stiffness, Dr. Lim diagnosed Petitioner with cervical disorder with radiculopathy and provided Petitioner with a prescription for Norco and for physical therapy PEX 6, pg. 9-10 & 26-27. Petitioner attended physical therapy from August 4 through November 1, 2016. PEX 6, pg. 10.

Dr. Lim testified that when he next saw Petitioner, on December 13, 2016, his symptoms had significantly worsened as a continuation of his work-related injury, including a significant loss of motion and weakness in his right arm with numbness and tingling. PEX 6, pg. 11. Dr. Lim

testified that at this point, he ordered an MRI and future treatment would be based on the MRI. PEX 6, pg. 12. On January 10, 2017, Dr. Lim reviewed the MRI with Petitioner and diagnosed him with several disc herniations, including at C3-4 and C6-7, which caused severe cervical stenosis. PEX 6, pg. 12. Dr. Lim also diagnosed Petitioner with an ossification of posterior longitudinal ligament posterior to the C6 vertebral body. PEX 6, pg. 12. Dr. Lim testified that the MRI was consistent with Petitioner's symptoms and at that time he ordered an epidural injection for Petitioner, which was eventually performed. PEX 6, pg. 13. Dr. Lim also restricted Petitioner from working because of his ongoing neck and upper extremity symptoms caused by his work injury on April 13, 2016. PEX 6, pg. 14-15.

Dr. Lim testified that he saw Petitioner on October 16, 2018 and discussed surgery with Petitioner. PEX 6, pg. 16. Dr. Lim testified that at that time, he told Petitioner that he had a "significantly increased risk of paralysis if he sustains a traumatic injury, accident [or] fall . . . given the findings of disc osteophyte complex abutting the spinal cord at C5-6." PEX 6, pg. 16. Dr. Lim therefore recommended that Petitioner work on losing weight, remain off of work, and return in three months for a posterior C3 to C7 fusion. PEX 6, pg. 16-17. Dr. Lim expressed urgency in his notes due to the risk of paralysis to Petitioner and testified that the definitive treatment for Petitioner's spine is surgical intervention. PEX 6, pg. 16-17. Dr. Lim further testified that he would have done the surgery if the City of Chicago had approved it out of concern for Petitioner's safety and the risk of paralysis. PEX 6, pg. 40. Dr. Lim testified that Respondent's delay in authorizing Petitioner's surgery exposes him to the danger of paralysis. PEX 6, pg. 40.

Dr. Lim testified that the treatment he provided and prescribed for Petitioner's neck has all been reasonable and necessary given the condition of Petitioner's neck as he found it. PEX 6, pg. 18-19. Dr. Lim further testified that the C3-C7 fusion he recommended for Petitioner is reasonable

and necessary given the condition of his cervical spine. PEX 6, pg. 19. Dr. Lim stated that Petitioner's condition will not improve without the surgery. PEX 6, pg. 19. Dr. Lim testified that the care and treatment he provided Petitioner resulted from the symptoms Petitioner developed after his April 2016 work incident. PEX 6, pg. 19. Additionally, Dr. Lim testified that Petitioner remains off of work because of his recommendation and that Petitioner is not capable of working as a hoisting engineer because of his neck condition. PEX 6, pg. 19.

Dr. Daniel A. Troy's Evidence Deposition

Dr. Daniel Troy testified via evidence deposition on August 12, 2019. REX 1. On April 17, 2017, Respondent arranged an examination pursuant to §12 of the Act with Dr. Daniel Troy. Dr. Troy was provided materials by a claim's handler working on behalf of Respondent. REX 1, pg. 26

Dr. Troy is a board-certified orthopedic surgeon. REX 1, pg. 5. He testified that he was never provided and never reviewed Petitioner's Functional Capacity Evaluation (FCE) from before Petitioner's return to work in 2014, wherein Petitioner indicated no complaints of cervical pain. REX 1, pg. 27. Further, Dr. Troy was never provided and never reviewed any of the extensive medical records involving Petitioner from prior to the April 13, 2016 work accident, wherein Petitioner did not make any complaints of cervical pain. REX 1, pg. 22 & 26-27. Dr. Troy testified that if he had been provided said records by Respondent, he would have reviewed them. REX 1, pg. 22. Dr. Troy testified that he was not aware of Petitioner having any symptoms regarding his cervical spine prior to the April 13, 2016 date of accident. Dr. Troy stated that if Dr. Lim indicated that Petitioner never had any cervical symptoms prior to April 13, 2016, that would be correct. REX 1, pg. 22-23.

Dr. Troy indicated that the duties of a Local 150 operating engineer include driving, operating, and maintaining machines, which entails greasing, oiling, fueling, and climbing in, out, and around the machine. REX 1, pg. 28. Dr. Troy testified that Petitioner could perform those tasks prior to his April 2016 work incident. REX 1, pg. 29. Most notably, Dr. Troy testified that the April 2016 work incident caused Petitioner to have symptoms he had not had prior. REX 1, pg. 29. Dr. Troy testified that Petitioner accurately reported his symptoms and that his symptoms were consistent with those he reported to Dr. Lim and the personnel at MercyWorks. REX 1, pg. 29-30.

Dr. Troy testified that the treatment Petitioner underwent after the April 2016 incident was reasonable and necessary given Petitioner's April 2016 injury and symptoms. REX 1, pg. 31. Dr. Troy testified that Petitioner could successfully lift 35 to 50-pound propane tanks prior to the December 2016 incident, and that Petitioner suffered an injury while lifting a propane tank at work in December 2016. REX 1, pg. 32. Dr. Troy further testified that it was reasonable and necessary for Petitioner to undergo epidural steroid injections as a result of the December 2016 injury. REX 1, pg. 32-33. Dr. Troy testified that he felt Petitioner would be at Maximum Medical Improvement and capable of returning to work after one epidural steroid injection. REX 1, pg. 20. However, Dr. Troy also testified that there are no medical records indicating Petitioner's cervical spine symptoms returned to their pre-April 2016 baseline, such that Petitioner could return to his position as a hoisting engineer, even after Petitioner received three epidural steroid injections and underwent physical therapy. REX 1, pg. 36-38. Dr. Troy also testified that Dr. Lim's proposal for surgery is appropriate. REX 1, pg. 38.

Dr. Troy testified that his § 12 opinion that Petitioner would be at Maximum Medical Improvement two weeks after an epidural steroid injection was aspirational and that Petitioner's three injections and physical therapy did not alleviate his symptoms to the point where he could

return as a hoisting engineer. REX 1, pg. 44-45. Dr. Troy further testified that if Petitioner is unable to tolerate the pain caused by his injury, he should not return to work as a hoisting engineer. REX 1, pg. 45-46.

Dr. Troy testified that it is reasonable and necessary for Petitioner to undergo a cervical fusion given his symptoms. REX 1, pg. 48. Additionally, Dr. Troy testified that Petitioner did not have those symptoms prior to April or December of 2016 and those incidents produced Petitioner's current symptoms. REX 1, pg. 49.

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 casually 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 parties stipulated that Petitioner sustained accidental injuries to his cervical spine on April 13, 2016 and December 15, 2016. There are disputes as to whether Petitioner's cervical disc injuries and stenosis are causally related to Petitioner's April and December 2016 work-related incidents.

The Petitioner's testimony, Dr. Lim's testimony, the medical records, and Respondent's own § 12 examiner's testimony indicate that Petitioner did not have any neck pain or any other signs or symptoms indicating cervical spine issues prior to April 13, 2016. The evidence further shows that Petitioner was capable of performing his full duties as a hoisting engineer prior to April 13, 2016 and after that date, with treatment. However, Petitioner sustained a cervical injury that produced new, worsening neck symptoms, which continued without relief until the secondary

injury on December 15, 2016. Petitioner became unable to perform his duties as a hoisting engineer following his December 15, 2016 work-related accident. Following Petitioner's December 20, 2016 MRI, Dr. Lim, Petitioner's long-time treating physician, took Petitioner off of work because of the risk of paralysis associated with Petitioner's spinal canal stenosis. Dr. Lim has not cleared Petitioner to return to work.

The facts and evidence make it clear that Petitioner suffered two work-related incidents, which aggravated Petitioner's underlying degenerative cervical condition. Petitioner had no signs or symptoms of cervical spine stenosis or disc bulging until April 13, 2016, after Petitioner ran into a speed bump with a backhoe, causing him to be thrown around inside the cab of the machine. Petitioner returned to work with cervical symptoms until December 15, 2016, when Petitioner experienced a significant worsening of his symptoms after feeling a popping sensation and new, worsening pain in his neck while lifting a propane tank at work.

Respondent's §12 examiner opined that Petitioner had a preexisting degenerative process in his cervical spine, which he agreed is normal to some extent with people age 50 and above. Dr. Troy relied on this preexisting condition to argue that Petitioner's injury is not work related.

However, the fact that the employee had a preexisting condition, even though the same result may not have occurred had the employee been in normal health, does not preclude a finding that the employment was a causative factor. St. Elizabeth Hosp. v. Workers' Comp. Comm'n, 371 Ill.App.3d 882, 888 (5th Dist. 2007). Every natural consequence that flows from an injury which arose out of and in the course of the claimant's employment is compensable under the Workers' Compensation Act. Cent. Rug & Carpet v. Industrial Comm'n, 361 Ill.App.3d 684, 690 (1st Dist. 2005). The claimant need not show that the work injury was the sole or even principal cause of an injury, but need only show evidence from which the inference can be drawn that the injury was a

causative factor. City of Streator v. Industrial Comm'n, 92 Ill.2d 353, 363-64 (1982). Causation in a workers' compensation case may be established by a chain of events showing prior good health, an accident and a subsequent injury. Gano Electric Contracting v. Industrial Comm'n, 260 Ill.App. 3d 92, 96-97, 631 N.E.2d 724 (1994). 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 also well-settled that an employee is fully entitled to benefits if a pre-existing condition has been aggravated, exacerbated or accelerated by an accidental injury. See e.g. Lopez v. Braner USA, Inc., 07 W.C. 8678 ("[o]ur Courts have frequently and repeatedly written that [workers' compensation law] is for the protection of the old and the young, the diseased and the healthy, and that a person is entitled to the benefits of the Act if a pre-existing condition is aggravated, exacerbated or accelerated by an accidental injury.").

The present case is supported by both the chain of events and the medical testimony. Petitioner has demonstrated that any cervical condition he had prior to the April 2016 work-related incident was asymptomatic and not interfering with Petitioner's work until the two work-related incidents. Petitioner's symptoms have been present and worsening since the two work-related incidents aggravated, exacerbated, and accelerated Petitioner's condition.

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 364 (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 Comm'n, 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.

Dr. Troy was not provided any of Petitioner's medical records or Functional Capacity Evaluation from before Petitioner's April 13, 2016 work incident. Thus, Dr. Troy could not determine whether or not Petitioner had exhibited symptoms prior to the work-related incidents. Additionally, Dr. Troy only saw Petitioner once, on April 17, 2017, while Dr. Lim has treated Petitioner for years and saw Petitioner twelve times from the work incident in April 2016 to January 2019.

Having reviewed the testimony of the medical providers, the testimony of Petitioner and the medical records, the Arbitrator finds the causation opinions of the treating physician, Dr. Lim, are supported by the facts and are more persuasive than those of Dr. Troy.

Thus, pursuant to Dr. Lim's opinions and the case law, the Arbitrator finds that Petitioner has demonstrated that his current state of ill-being was caused by the April 13, 2016 and December 15, 2016 work-related incidents. The evidence shows Petitioner had no signs or symptoms of

cervical disc injury or spinal canal stenosis prior to April 13, 2016. While Petitioner had a degenerative disc condition, that condition was asymptomatic prior to April 13, 2016. Petitioner was able to return to work with symptoms following the April 13, 2016 incident. However, Petitioner has shown that he suffered a work-related injury on December 15, 2016, which aggravated his existing degenerative condition in his cervical spine, causing pain which prevented further work. Following the December 15, 2016 incident, Petitioner's symptoms worsened and Petitioner's treating physician, Dr. Lim, placed work restrictions on him that prevented Petitioner from returning to his position as a hoisting engineer. Respondent did not offer Petitioner sedentary work within the restrictions set by Dr. Lim. Both Dr. Lim and Respondent's § 12 examiner have opined that a C3-7 fusion is reasonably and medically necessary to relieve Petitioner of his symptoms. The Arbitrator finds that Petitioner's current state of ill-being is a result of, and caused by, Petitioner's work activities. The Arbitrator concludes that the need for Petitioner's C3-7 fusion as recommended by Dr. Lim is the result of Petitioner's work activities, which caused Petitioner's symptoms and accelerated the need for the fusion.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Based on the Arbitrator's findings with respect to causal connection, Petitioner is entitled to reasonable and necessary medical treatment to address the conditions of ill-being in his neck.

It appears that Respondent has paid for some of Petitioner's medical bills while Petitioner's group health insurance has paid for others. REX 2 & PEX 2-5. The Arbitrator has reviewed these exhibits and the medical records submitted and finds that the bills submitted are reasonable, necessary, and causally related to the accidents.

Based on the record as a whole, and the Arbitrator's finding with respect to causal connection, the Arbitrator finds that Respondent shall pay reasonable and necessary medical bills for services, contained in PEX 2-5 as provided in Section 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision with respect to (K) Prospective Medical, the Arbitrator finds as follows:

Based upon the Arbitrator's finding with respect to causal connection, Petitioner is entitled to reasonable and necessary medical treatment to address the conditions of ill-being in his neck, including the C3-7 spinal fusion that Dr. Lim recommended and Dr. Troy said would be appropriate.

Based on the records as a whole, and the Arbitrator's finding with respect to causal connection, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he is in need of further prospective medical treatment. Respondent shall authorize and pay for additional reasonable and necessary medical treatment consistent with the recommendations of Dr. Lim, Petitioner's treating physician, including the C3-7 fusion, physical therapy, prescriptions, and other reasonable and necessary medical treatment.

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. "[W]eekly compensation ... shall be paid ... as long as the total temporary incapacity lasts," which has been 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.

Based upon the Arbitrator's findings with respect to causal connection and prospective medical, Petitioner is not yet at maximum medical improvement. He is still in need of further treatment, including the C3-7 spinal fusion, and has not been released from the care of his treating physician, Dr. Lim. He is still restricted and is unable to work without restrictions.

Based on the record as a whole and the Arbitrator's findings with respect to causal connection and prospective medical, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he is entitled to temporary total compensation benefits for 139.857 weeks for the period commencing January 11, 2017 through September 16, 2019. Parties stipulated that Petitioner's average weekly wage is $1,914.05. Thus, Petitioner is owed $178,462.19 for the period between January 11, 2017 and September 16, 2019.

In support of the Arbitrator's decision with respect to (M) Penalties and Fees, the Arbitrator finds as follows:

Section 19(l) of the Act states that "[i]n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." Section 19(k) of the Act states that "[i]f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer of 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 Commission shall allow the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld of refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay."

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

Where no good faith basis exists for the refusal or delay in payment of benefits owed exists, the Respondent bears the burden to show that it had a reasonable belief that the delay in paying petitioner's benefits was justifiable. Gallegos v Rollex Corp. , 03 IIC 0173 (Mar. 10, 2003), City of Chicago v Industrial Comm'n, 98 Ill. 2d 407 (1983). The employer must show that the facts in its possession would lead a reasonable person to believe the employee is not entitled to prevail under the Act. Cook County v Industrial Comm'n, 160 Ill. App. 3d 825, 830 (1st Dist. 1987).

Given the facts and circumstances, Respondent City of Chicago's failure to pay TTD to its employee, who sustained an injury while working, is not justifiable. As a direct and immediate consequence of that injury, Petitioner was disabled from working. Respondent's reliance on Dr. Troy is unwarranted. Dr. Troy was not provided and failed to review Petitioner's medical records from before April 2016, so his opinion that Petitioner had a pre-existing, long-standing and

symptomatic degenerative cervical condition is based on speculation rather than facts. Dr. Lim has treated Petitioner for years, knows Petitioner's medical history, and has testified that Petitioner was asymptomatic prior to the April 2016 work incident.

Respondent, City of Chicago, significantly delayed Petitioner's first epidural injection and has refused to authorize or pay for Petitioner's C3-7 fusion. Dr. Lim testified that both treatments are causally related to the April 13, 2016 and December 15, 2016 work incidents. Further, Dr. Lim testified that Respondent's delay of Petitioner's fusion has put Petitioner at high risk for permanent damage, neurologic catastrophe, and paralysis. PEX 6, pg. 39-40. In addition to risking Petitioner's health by refusing to approve Petitioner's fusion, Respondent has refused to pay TTD benefits from December 7, 2018 on. Petitioner testified that Respondent cut off his TTD benefits, refused to provide him light-duty work despite the fact that the Respondent had offered it in the past, and forced Petitioner to retire. Petitioner testified that he would still be working as a hoisting engineer if he could and that he would prefer to work rather than be retired. The Arbitrator finds that Respondent's refusal has no basis in the law and is unreasonable, vexatious and not justifiable.

Respondent failed to pay TTD benefits due to Petitioner from December 7, 2018 to September 16, 2019 (40.571 weeks at $1,276.10 per week) or $51,773.20. Respondent has failed to pay some of the bills listed in PEX 2-5. Some of these bills have been paid by Petitioners group health insurance. Moreover, Respondent failed to prove it was justified when it failed to authorize or pay for Petitioner's treatment and surgery. This refusal was unwarranted. The Arbitrator finds that Respondent's unwarranted refusal to authorize and pay for prescribed treatment was unreasonable and vexatious.

Respondent's refusal to pay TTD benefits from December 7, 2018 to September 16, 2019 in the amount of $51,773.20 was not justified. Respondent, City of Chicago shall pay $25,886.60 in penalties Pursuant to 820 ILCS 305/19(k).

A delay in payment of 14 days or more creates a presumption of unreasonable delay. 820 ILCS 305/19(l). In this case, Respondent has not met its burden to show that the delay in paying TTD was reasonable. Pursuant to Section 19(l), the Arbitrator awards penalties in the amount of $10,000. Petitioner has been denied benefits owed under the Act. The delay in benefits has severely prejudiced Petitioner—causing him to prematurely retire and give up his occupation as a hoisting engineer.

In addition, pursuant to 820 ILCS 305/16, attorney's fees in the amount of $10,000 are ordered to be paid by Respondent. Petitioner's attorney has been forced to repeatedly appear in Court and conduct multiple depositions in an effort to secure benefits owed his client. This work would be unnecessary if Respondent has fulfilled its duties under the Act and paid Petitioner the benefits owed.

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

Xavier Cuello,

Petitioner,

21IWCC0002

vs.

NO: 18 WC 34394

Giao Tran, Forest2000 Contractor, Inc., Queen Nails Corp., Nguyen Sy Tran, Dimitris Bubaris, Kitsa Bubaris, and the State Treasurer as Ex-Officio Custodian of the Illinois Injured Workers' Benefit Fund,

Respondents.

DECISION AND OPINION UNDER SECTION 4(d)

This matter comes before the Commission on Petitioner's motion pursuant to section 4(d) of the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/4(d) (West 2018)). Petitioner seeks findings that Respondents Giao Tran (Giao) and Forest2000 Contractor, Inc. (Forest2000) were subject to the Act; Petitioner was an employee of these two Respondents on September 11, 2018; and these two Respondents knowingly failed to provide workers' compensation insurance which would have covered work-related injuries Petitioner sustained at a job site. For the reasons that follow, the Commission grants the petition.

On November 19, 2018, Petitioner filed his initial Application for Adjustment of Claim in this matter. On February 14, 2019 Petitioner filed his petition pursuant to section 4(d) of the Act regarding Respondents Giao and Forest2000. On June 4, 2020, Petitioner filed a second petition pursuant to section 4(d) regarding not only Respondents Giao and Forest2000, but also Respondents Nguyen Sy Tran (Nguyen), Queen Nails, Inc. (Queen Nails), Dimitris Bubaris (Dimitris), and Kitsa Bubaris (Kitsa).

A hearing on the petition was held before Commissioner Barbara N. Flores on July 16, 2020. Counsel for Petitioner, Respondents, and the Injured Workers' Benefit Fund (IWBF, Fund) were present, excepting Respondent Giao, who appeared *pro se*. A record was made on this date. On August 11, 2020, prior to the closing of proofs in this matter, Petitioner filed a third petition pursuant to section 4(d), expressly withdrawing his section 4(d) claims regarding Respondents Nguyen, Queen Nails, Dimitris, and Kitsa.[1] On December 10, 2010, a second hearing was held to close the proofs. Counsel for Petitioner, Respondents, and the Fund were present; Respondent Giao did not attend. A record also was made on this date.

I. Statement of Facts

Dimitris Bubaris testified by deposition that Kitsa Bubaris was his wife. He stated that he was the owner of the property located at 7069 North Clark Street in Chicago and that Kitsa's name was also on the deed. According to Dimitris, the building on the property has several addresses: 7057, 7061, 7063, 7065, 7067, and 7069 North Clark Street. He testified that as of September 11, 2018, Queen Nails was the tenant in 7063. He stated that Nguyen Sy Tran, the president of Queen Nails, wanted to expand the business from its location in 7063 into 7061. He also testified that he had been in Greece for some period of time and learned upon returning that there had been an accident involving the remodeling of the property.

Nguyen Sy Tran testified by deposition through an interpreter that he is the owner of the Queen Nails salon, located at 7063 North Clark Street in Chicago. He stated that Dimitris Bubaris was his landlord. According to Nguyen, he told Mr. Bubaris that he wanted to expand into 7061 and intended to remodel when they signed a lease in February 2018. He testified that he hired Giao Tran to remodel the property.

Petitioner testified by deposition that on September 11, 2018, he was working at the site of Queen Nails as an employee for and under the direction of Giao. He identified Giao's company as Forest2000. He stated that he had worked at this site for a few days and had been told to go there by Giao. Petitioner added that he met both Giao and a co-worker at the site.

Petitioner also testified that Giao became his boss in the Spring of 2018. According to Petitioner, Giao had been looking for another worker and he was introduced to Giao through his brother-in-law's wife's family. He stated that they met at Giao's home, where Giao offered him work after asking about his skills.

Petitioner testified that he was assured by Giao that there was plenty of work at multiple jobs that would justify the driving involved. He further testified that they agreed on an initial

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[1] The Commission notes that Petitioner's third petition was filed after the commencement of the hearings in this matter, but prior to the close of the proofs. The decision to allow the amendment of a pleading generally falls within the discretion of the Commission. *Cf. Mora v. Industrial. Comm'n*, 312 Ill. App. 3d 266, 274 (2000) (discussing the amendment of Application for Adjustment of Claim). None of the Respondents have argued that they would be unfairly prejudiced by permitting the filing of the amended petition in this case. In addition, the Commission notes that an amendment that is complete in itself and does not refer to or adopt a prior pleading supersedes the original, which ceases to be a part of the record and is considered abandoned or withdrawn. *E.g., Bonhomme v. St. James*, 2012 IL 112393, ¶ 17. Accordingly, the Commission allows Petitioner to proceed and seek relief only as to Respondents Giao Tran and Forest2000.

21IWCC0002

$11.00 hourly wage to be paid in cash until checks could be set up (though he ultimately was never paid by check). Petitioner stated that this wage was later raised to $12.00 due to the amount of daily mileage he was putting on his automobile because he lived in Zion. Petitioner stated that he would usually be paid on Fridays unless they worked through to a Saturday or Sunday. He later explained that he was paid by the hour, not by the job. He also stated that he never completed a W-4 form and Giao did not withhold payroll taxes.

Petitioner additionally testified that Giao would tell him when to start work, when to take a lunch break, when to go home, which days he would be off work, which days they would be working late, and whether he wanted something done in a particular way. Petitioner stated that Giao provided the work tools and work truck. He stated that he would drive to work and he and his co-worker would drive the work truck to the job sites. He also stated that if they were lacking a tool at a site, they would have to drive back to Giao's house to retrieve it. The one exception identified by Petitioner was a cordless drill set which Giao had purchased for Petitioner.

Petitioner noted that prior to September 11, 2018, they had driven in Giao's work truck to another nail salon, where Giao installed massage or spa chairs, while Petitioner changed light fixtures in the ceiling. Petitioner recalled that they worked at this site for approximately nine hours. Petitioner recalled that he worked on perhaps five other jobs with Giao before working at the Queen Nails location.

Regarding the Queen Nails job, Petitioner testified that he, Giao, a co-worker named Antonio Vasquez, and Giao's uncle were also present at the site. According to Petitioner, Mr. Vasquez told him he had been working for Giao for approximately two years. Petitioner stated that he never really spoke to Giao's uncle, who assisted in cleaning the work area, but was from Vietnam and did not speak English. Petitioner described his duties at this site as including removing an old bathroom as well as removing drywall and flooring. Petitioner stated that these jobs involved using a Sawzall, drywall knives, regular knives, hammers, screwdrivers, and drills.

Petitioner further testified that on September 11, 2018, at approximately 2:00 p.m., he was working in an alley, using a ladder provided and set up by Giao. He stated that they were using a rope to pull electrical cable through a pipe from a new circuit breaker that was being installed, from Queen Nails to a Mexican grocery store in the corner unit of the same building. He also stated that Giao had provided both the cable and the rope. Petitioner testified that he fell from the ladder. He later stated that he suffered a fractured calcaneus, broken in four pieces at the right heel, as well as injuring parts of his ankle.

Giao testified by deposition through a translator that he was born in Vietnam in 1979 and immigrated to the United States in 1995. He stated that he had worked in the construction business for six or seven years as the sole owner of Forest2000. He stated that he registered his business with the State of Illinois. He also stated that he met Petitioner through mutual acquaintance to help him work one or two days weekly because Petitioner had no job and needed money.

Giao recalled Petitioner helping him for a month or two with jobs like painting houses, and cleaning up around Giao's house prior to working at 7061 N. Clark Street. Giao stated that he believed he paid Petitioner $13.00 hourly in cash because Petitioner did not have legal documentation to work. Over objection, Giao further testified that he told Petitioner the start time for these jobs and told him when to stop cleaning his house, but not the end time for the house painting. Indeed, Giao testified that Petitioner came or went whenever he wanted. Giao later stated that all of the equipment used on his jobs belonged to him, with the possible exception of some painting tools provided by Petitioner.

Giao added that he sometimes had other people assist him in his work. He testified that his assistants would place drywall during construction work, which involved the use of sharp cutting tools. He stated that he had a contractor's license for a year or two, but no longer did because his business was now closed.

According to Giao, Petitioner worked at 7061 N. Clark Street for perhaps three days. Giao stated that he paid an architect to prepare plans for this job. He testified that the plans were approved by his customer, Nguyen, whom he identified as the owner of Queen Nails. Giao stated that he applied for a permit and placed it in the window at the site. Giao did not know who owned the property and added that he never met anyone named Bubaris.

Giao testified regarding Petitioner's fall in the alley at the site. Giao explained that he was inside the building, holding the electrical cable so that Petitioner could pull it with a rope through a hole approximately 10 feet from ground level. According to Giao, Petitioner set up an extension ladder owned by Giao and Giao went up the ladder to check the situation before starting the task. Giao stated that he and Petitioner were using their telephones as walkie-talkies to coordinate the task. He instructed Petitioner: "Whenever I tell you pull, and you pull." He testified that he had Petitioner outside because it was the easier part of the task and he was concerned that Petitioner would damage the cable. Giao also stated Petitioner was standing approximately six to eight feet from the ground on the ladder when the rope broke although he did not actually witness the fall. Giao testified that he heard a noise and went to the alley to see what had happened. Giao stated that Petitioner was in pain, so Giao called for an ambulance to take Petitioner to the hospital.

Giao further stated that he knew an insurance agent named Mr. Truong, whom he believed worked for Country Companies. Giao stated that he told Mr. Truong he needed insurance and he did not know what Mr. Truong did. He testified that in October 2017, he did not know that construction workers, electrical workers, and workers in industries using sharp cutting tools were entitled to be covered by workers' compensation insurance. He stated that he did not know what "work comp" is. He added that all he knew was that if "the city" required insurance, he went to the insurance company and bought it. He denied telling Mr. Truong that the workers' compensation insurance premium was too high. He testified that he did not know what the coverage was and told Mr. Truong that he did not need it because he thought he had insurance that covered everything. He added that after Petitioner's fall he contacted his insurer and learned that the people working for him were not covered. According to Giao, he purchased workers' compensation insurance one or two weeks later.

Nhon Truong testified by deposition that he is a licensed insurance agent and a financial representative for Country Financial. He stated that Giao was a customer of his since 2016. He also stated that he was born in Vietnam but English was his native language. According to Mr. Truong, he conducted business with Giao in both languages and the two understood each other very well. He later estimated that he was 60-70 percent fluent in speaking Vietnamese.

Mr. Truong testified that on October 20, 2017, he discussed workers' compensation insurance with Giao, explaining that such coverage was necessary for persons in the construction business. He stated that he provided Giao a quote for a premium for workers' compensation coverage at that time of $1,236.00. He later explained this figure was derived from the base salary of the business owner without knowledge of the number of employees. According to Mr. Truong, Giao replied that "it's too expensive and he feel that he – he doesn't have the employees. He said 1099." Mr. Truong later testified that when dealing with a contractor, "[i]f he's 1099 we also encourage him that he must have workers' compensation."

Mr. Truong reviewed an insurance proposal for commercial premium summary and testified that Giao had crossed out and initialed the refusal of workers' compensation coverage in his presence. Mr. Truong later testified that Giao took business insurance, general liability and small tool coverage. Mr. Truong's summary, the contents of which are consistent with his testimony, was admitted into evidence with no objection.

Mr. Truong also testified that Giao met with him on September 19, 2018 to request workers' compensation insurance. According to Mr. Truong, Giao stated that he wanted the coverage for his employee. During this testimony, Mr. Truong was asked whether Giao mentioned something about 1099 or 1099 contractors during the first discussion, answering: "He did not tell me at that time about -- anything about 1099 work -- employees, W-2. He didn't mention anything about that."

II. Evidentiary Rulings

During the July 16, 2020 hearing, Petitioner submitted a number of exhibits subject to objections by the Respondents. The following exhibits are rejected for lack of foundation: Petitioner's Exhibit 1, a certificate of liability insurance for Giao Tran; Petitioner's Exhibit 3, an agreement between Forest2000 and Queen Nails; Petitioner's Exhibit 5, a property ownership record naming the Bubarises as owners of the site in question; and Petitioner's Exhibit 6, a City of Chicago permit naming Forest2000 as the general contractor for the site at issue.

The following exhibits are rejected for lack of foundation and lack of a subpoena for each exhibit: Petitioner's Exhibit 22, the commercial lease for 7061 and 7063 North Clark Street signed by the lessor's agent and Nguyen Sy Tran on February 1, 2018; Petitioner's Exhibit 23, containing a certificate of liability insurance for Queen Nails, a series of photographs and architectural drawings, a proposal and agreement regarding work at the site at issue signed by Giao Tran and Nguyen Sy Tran, a Notice of Attorney's Lien, and Medicare records[2]; and Petitioner's Exhibit 24, which includes insurance records related to Giao and Mr. Truong

[2] Exhibit 23 also includes Petitioner's file-stamped amended Application for Adjustment of Claim and Attorney Representation Agreement, which are admitted into evidence.

(excepting the insurance proposal commercial premium summary, which was submitted into evidence without objection during Mr. Truong's deposition).

Petitioner's Exhibit 4, a certification from the National Council on Compensation Insurance, Inc. ("NCCI") – the Commission's designated agent for the purpose of collecting proof of coverage information on Illinois employers who have purchased workers' compensation insurance from carriers – stating that its records do not show policy information was filed showing proof of Illinois workers' compensation coverage on September 11, 2018 for Giao Tran, is accepted into evidence. Petitioner's Exhibit 7, a copy of a 2019 record of the Illinois Secretary of State indicating that Respondent Giao was the agent for and president of Respondent Forest2000 since February 2, 2010, and stating the corporation was not in good standing, is also admitted as a public record.

III. Conclusions of Law

This petition comes before the Commission pursuant to section 4 of the Act, which contains regulations to ensure that employers maintain adequate workers' compensation insurance and pay compensation claims to their employees. 820 ILCS 305/4 (West 2018); see *Keating v. 68th & Paxton L.L.C.*, 401 Ill. App. 3d 456, 464 (2010). Section 4(d) empowers the Commission to enforce those regulations. 820 ILCS 305/4(d) (West 2018); *Keating*, 401 Ill. App. 3d at 464. Specifically, section 4(d) authorizes the Commission, after conducting a hearing in accordance with due process principles, to determine whether an employer failed to provide the requisite insurance. 820 ILCS 305/4(d) (West 2018); *Keating*, 401 Ill. App. 3d at 465. If the employer is deemed noncompliant, the Commission must determine whether that noncompliance was knowing or negligent. 820 ILCS 305/4(d) (West 2018).

Based on the testimony provided by Petitioner, Giao Tran, and Nguyen Sy Tran, the Commission initially finds that Respondents Giao Tran and Forest2000 were engaged in an extra hazardous business, namely, the remodeling of any structure, and therefore were subject to the Act and required to provide workers' compensation insurance to their employees. See 820 ILCS 305/1, 3, 4 (West 2018).

The next issue is whether Petitioner established that he was an employee of Respondents under the Act. "[V]arious factors that help determine when a person is an employee: whether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may discharge the person at will; and whether the employer supplies the person with materials and equipment." *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 175 (2007). The right to control the manner of the work is often called the most important consideration. *Id.*

In this case, it was undisputed that Respondent Giao Tran, as the president of Respondent Forest2000 paid Petitioner hourly and supplied him with materials and equipment. It was also undisputed that Giao did not withhold taxes from Petitioner's compensation, but Giao's testimony explains that he acted as he did because Petitioner was an undocumented worker. Petitioner and Giao offered differing testimony regarding whether Giao dictated Petitioner's

schedule, but the Commission is persuaded by Petitioner's testimony that Giao did control Petitioner's schedule, particularly in light of Giao's testimony that he had at a minimum notified Petitioner of the starting time for the jobs on which he worked. Although there is no direct testimony on whether Giao could discharge Petitioner at will, the testimony establishes that Giao directed when Petitioner would work, if at all.

Most significantly, the record establishes that Giao directed Petitioner in the manner in which he performed his work, particularly on the date of Petitioner's injury. Giao checked the ladder he owned before he and Petitioner tried to pull the electrical cable through the pipe in the building. Giao used his telephone as a walkie-talkie to instruct Petitioner when to pull on the rope attached to the electrical cable. Giao also testified that he had Petitioner outside because it was the easier part of the task and he was concerned that Petitioner would damage the cable. Accordingly, after considering all of the relevant factors the Commission includes that Petitioner was an employee of Respondents Giao Tran and Forest2000 at the time of Petitioner's injury.

The remaining issue is whether Respondents Giao Tran and Forest2000 knowingly failed to provide workers' compensation insurance which would have covered the injuries Petitioner sustained in the fall from the ladder at the job site on September 11, 2018. Giao maintains in his testimony and brief that he did not believe that he needed to carry workers' compensation insurance because he already maintained other insurance that "covered everything." Yet Mr. Truong, Giao's insurance agent, testified that he explained to Giao that workers' compensation insurance coverage was necessary for persons in the construction business. According to Mr. Truong, Giao replied that "it's too expensive and he feel that he – he doesn't have the employees. He said 1099." Mr. Truong also testified that when dealing with a contractor, "[i]f he's 1099 we also encourage him that he must have workers' compensation." Indeed, Mr. Truong later testified that during this first conversation, Giao did not mention anything about 1099 work. Mr. Truong's summary of the insurance proposal establishes that Giao had crossed out and initialed the workers' compensation coverage in his presence. The Commission recognizes that Giao's primary language is Vietnamese, but Mr. Truong testified without rebuttal that he spoke both Vietnamese and English and communicated with Giao very well.

Given the totality of the record, the Commission finds that Respondents Giao Tran and Forest2000 knowingly failed to provide workers' compensation insurance which would have covered Petitioner's injuries at the job site on September 11, 2018. See, *e.g.*, *Illinois Workers' Compensation Comm'n, Insurance Compliance Division v. Roman Coin Pizza, Inc.*, 8 IWCC 1433. As such, Respondents "are no longer entitled to the benefits and protections of the Act and may be sued in civil court." See *Keating*, 401 Ill. App. 3d at 466 (2010).

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition pursuant to section 4(d) of the Act is granted.

21IWCC0002

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

DATED: JAN 4 - 2021
d: 12/10/20
BNF/kb
45

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 Other (explain) Motion to Reinstate	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paola Martinez,
Petitioner,

vs.

No. 16 WC 21925
(Consol'd with 16 WC 35674
17 WC 04557
17 WC 04558)

American Gasket & Rubber Co. and Peapod, LLC.,
Respondents.

21IWCC0003

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the sole issue of whether the Arbitrator erred in denying Petitioner's Motion to Reinstate, and being advised of the facts and law, reverses the Decision of the Arbitrator, reinstates the case for the reasons stated below, and remands the case to the Arbitrator for further proceedings in accordance herewith.

FINDINGS OF FACT

Petitioner filed four Applications for Adjustment of Claims: two against Respondent American Gasket & Rubber Co. and two against Respondent Peapod, alleging four different dates of accident. The cases were consolidated on June 15, 2017 upon motion of Respondent Peapod.

Respondents allege that their attempts to engage Petitioner in settlement discussions were unsuccessful, and both Respondents had set the cases for hearing on multiple occasions. Petitioner continued the cases, arguing they were not ripe for trial or settlement. At the time of the Chicago call on December 18, 2019, Respondent Peapod filed a motion for trial or dismissal of the two claims filed against it, 17 WC 04457 and 17 WC 04458.

Commission Rule 9020.60(b)(2)(D)(i) requires Petitioner or her attorney to be present at the call or to timely seek a continuance if the case is above the red line. Petitioner's counsel failed to request a continuance or to appear at the December 18, 2019 Chicago call. The Arbitrator set all four cases for hearing on December 23, 2019. Petitioner's attorney did not appear at the time

set for hearing, and the Arbitrator dismissed the four consolidated cases on motion of Respondent Peapod.

Petitioner filed a Motion to Reinstate her four cases on December 26, 2019, arguing that she had not failed to prosecute her claims and that reinstating the claims would not prejudice Respondents in any way. At the motion hearing on February 26, 2020, Petitioner's attorney explained that the four claims overlapped, and sorting out treatment and medical bills required extra trial preparation time. Moreover, Petitioner had instructed her attorney not to settle her claims, as she was uncertain whether she would require additional treatment.

Although Respondent American Gasket had forwarded proposed settlement contracts to Petitioner's counsel in July 2018, according to her attorney, Petitioner was still treating for both her back and elbow injuries at that time and was not yet in a position to consider settlement. Petitioner last saw her treating physician for her back injury in August 2018; at that time, the doctor advised her that she might require back surgery in the future. Additionally, Respondent Peapod had scheduled a §12 exam related to Petitioner's right elbow injury for December 2018. The §12 examiner was expected to apportion liability for Petitioner's condition between the two Respondents. Petitioner's counsel advised the Arbitrator that he had not wished to negotiate potential settlements until the relative liability of each Respondent had been determined.

Respondents countered Petitioner's argument that she had diligently prosecuted her case by alleging prejudice to their positions. While Petitioner delayed settlement negotiations and trial settings, evidence grew cold and witnesses scattered. Respondent Peapod dissolved its Midwest operations and argued that this adversely impacted its ability to call witnesses.

On February 26, 2020, after hearing the parties' arguments, the Arbitrator denied Petitioner's motion to reinstate.

Petitioner filed a Petition for Review of the Arbitrator's denial of her motion to reinstate on March 12, 2020. A file-stamped copy appears in the record. Respondent Peapod filed a motion to dismiss Petitioner's appeal on the ground that Petitioner had failed to give Peapod or its counsel notice of having filed a Petition for Review within 30 days of the Arbitrator's decision. Respondent American Gasket did not join in Peapod's motion to dismiss the appeal. Petitioner filed a response to Peapod's motion for dismissal of her Petition for Review and attached an affidavit from Petitioner's attorney's office staff, attesting to timely preparing and mailing the Petition for Review to counsel for both Respondents.

Commissioner Parker advised the parties that the Motion to Dismiss would be taken with the case and heard at oral arguments.

CONCLUSIONS OF LAW

As discussed above, Petitioner's Motion to Reinstate was timely filed. Whether a case which has been dismissed for want of prosecution should be reinstated is a matter of discretion for the Arbitrator, who must apply standards of fairness and equity and consider the grounds relied

21IWCC0003

upon by Petitioner, the objections of the Respondent and Commission precedent. Commission Rule 9020.90(c).

The Commission views and interprets the record differently than the Arbitrator. None of the cases had ever before been dismissed for want of prosecution. Petitioner's counsel explained that Petitioner was still treating for her injuries in 2018 and that a §12 exam was performed in December 2018. Petitioner had instructed her attorney not to resolve her cases until her treating physician established that she did not require back surgery. Petitioner's counsel also explained that it was incumbent on him to gather and review the medical records and bills to determine which applied to each injury and that this process had not yet been completed.

Based upon the foregoing, the Commission finds that the Arbitrator erred in denying Petitioner's Motion to Reinstate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 26, 2020 is hereby reversed and case number 16 WC 21925 is reinstated.

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

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

DATED: JAN 5 - 2021

o-11/19/20
mp/dak
68

Marc Parker

Barbara N. Flores

Deborah L. Simpson

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 Other (explain) Motion to Reinstate	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paola Martinez,
Petitioner,

vs.

No. 16 WC 35674
(Consol'd with 16 WC 21925
17 WC 04557
17 WC 04558)

American Gasket & Rubber Co. and Peapod, LLC.,
Respondents.

21IWCC0004

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the sole issue of whether the Arbitrator erred in denying Petitioner's Motion to Reinstate, and being advised of the facts and law, reverses the Decision of the Arbitrator, reinstates the case for the reasons stated below, and remands the case to the Arbitrator for further proceedings in accordance herewith.

FINDINGS OF FACT

Petitioner filed four Applications for Adjustment of Claims: two against Respondent American Gasket & Rubber Co. and two against Respondent Peapod, alleging four different dates of accident. The cases were consolidated on June 15, 2017 upon motion of Respondent Peapod.

Respondents allege that their attempts to engage Petitioner in settlement discussions were unsuccessful, and both Respondents had set the cases for hearing on multiple occasions. Petitioner continued the cases, arguing they were not ripe for trial or settlement. At the time of the Chicago call on December 18, 2019, Respondent Peapod filed a motion for trial or dismissal of the two claims filed against it, 17 WC 04457 and 17 WC 04458.

Commission Rule 9020.60(b)(2)(D)(i) requires Petitioner or her attorney to be present at the call or to timely seek a continuance if the case is above the red line. Petitioner's counsel failed to request a continuance or to appear at the December 18, 2019 Chicago call. The Arbitrator set

all four cases for hearing on December 23, 2019. Petitioner's attorney did not appear at the time set for hearing, and the Arbitrator dismissed the four consolidated cases on motion of Respondent Peapod.

Petitioner filed a Motion to Reinstate her four cases on December 26, 2019, arguing that she had not failed to prosecute her claims and that reinstating the claims would not unfairly prejudice Respondents in any way. At the motion hearing on February 26, 2020, Petitioner's attorney explained that the four claims overlapped, and sorting out treatment and medical bills required extra trial preparation time. Moreover, Petitioner had instructed her attorney not to settle her claims, as she was uncertain whether she would require additional treatment.

Although Respondent American Gasket had forwarded proposed settlement contracts to Petitioner's counsel in July 2018, according to her attorney, Petitioner was still treating for both her back and elbow injuries at that time and was not yet in a position to consider settlement. Petitioner last saw her treating physician for her back injury in August 2018; at that time, the doctor advised her that she might require back surgery in the future. Additionally, Respondent Peapod had scheduled a §12 exam related to Petitioner's right elbow injury for December 2018. The §12 examiner was expected to apportion liability for Petitioner's condition between the two Respondents. Petitioner's counsel advised the Arbitrator that he had not wished to negotiate potential settlements until the relative liability of each Respondent had been determined.

Respondents countered Petitioner's argument that she had diligently prosecuted her case by alleging prejudice to their positions. While Petitioner delayed settlement negotiations and trial settings, evidence grew cold and witnesses scattered. Respondent Peapod dissolved its Midwest operations and argued that this adversely impacted its ability to call witnesses.

On February 26, 2020, after hearing all of the parties' arguments, the Arbitrator denied Petitioner's motion to reinstate.

Petitioner filed a Petition for Review of the Arbitrator's denial of her motion to reinstate on March 12, 2020. A file-stamped copy appears in the record. Respondent Peapod filed a motion to dismiss Petitioner's appeal on the ground that Petitioner had failed to give Peapod or its counsel notice of having filed a Petition for Review within 30 days of the Arbitrator's decision. Respondent American Gasket did not join in Peapod's motion to dismiss the appeal. Petitioner filed a response to Peapod's motion for dismissal of her Petition for Review and attached an affidavit from Petitioner's attorney's office staff, attesting to timely preparing and mailing the Petition for Review to counsel for both Respondents.

Commissioner Parker advised the parties that the Motion to Dismiss would be taken with the case and heard at oral arguments.

CONCLUSIONS OF LAW

As discussed above, Petitioner's Motion to Reinstate was timely filed. Whether a case which has been dismissed for want of prosecution should be reinstated is a matter of discretion for

the Arbitrator, who must apply standards of fairness and equity and consider the grounds relied upon by Petitioner, the objections of the Respondent and Commission precedent. Commission Rule 9020.90(c).

The Commission views and interprets the record differently than the Arbitrator. The cases had just reached the redline None of the cases had ever before been dismissed for want of prosecution. Petitioner's counsel explained that Petitioner was still treating for her injuries in 2018 and that a §12 exam was performed in December 2018. Petitioner had instructed her attorney not to resolve her cases until her treating physician established that she did not require back surgery. Petitioner's counsel also explained that it was incumbent on him to gather and review the medical records and bills to determine which applied to each injury and that this process had not yet been completed.

Based upon the foregoing, the Commission finds that the Arbitrator erred in denying Petitioner's Motion to Reinstate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 26, 2020 is hereby reversed and case number 16 WC 35674 is reinstated.

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

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

DATED: JAN 5 – 2021

o-11/19/20
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 Other (explain) Motion to Reinstate	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paola Martinez,
Petitioner,

vs.

No. 17 WC 04557
(Consol'd with 16 WC 21925
16 WC 35674
17 WC 04558)

American Gasket & Rubber Co. and Peapod, LLC.,
Respondents.

21IWCC0005

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 whether Petitioner's Petition for Review should be dismissed and whether the Arbitrator erred in denying Petitioner's Motion to Reinstate, and being advised of the facts and law, denies Respondent Peapod's Motion to Dismiss Petitioner's review and reverses the Decision of the Arbitrator as stated below. The Commission further remands this case to the Arbitrator for further proceedings.

FINDINGS OF FACT

Petitioner filed four Applications for Adjustment of Claims: two against Respondent American Gasket & Rubber Co. and two against Respondent Peapod, alleging four different dates of accident. The cases were consolidated on June 15, 2017 upon motion of Respondent Peapod.

Respondents allege that their attempts to engage Petitioner in settlement discussions were unsuccessful, and both Respondents had set the cases for hearing on multiple occasions. Petitioner continued the cases, arguing they were not ripe for trial or settlement. At the time of the Chicago call on December 18, 2019, Respondent Peapod filed a motion for trial or dismissal of the two claims filed against it, 17 WC 04457 and 17 WC 04458.

Commission Rule 9020.60(b)(2)(D)(i) requires Petitioner or her attorney to be present at the call or to timely seek a continuance if the case has risen above the red line. Petitioner's counsel failed to request a continuance or to appear at the December 18, 2019 Chicago call. The Arbitrator

set all four cases for hearing on December 23, 2019. Petitioner's attorney did not appear at the time set for hearing, and the Arbitrator dismissed the four consolidated cases on motion of Respondent Peapod.

Petitioner filed a Motion to Reinstate her four cases on December 26, 2019, arguing that she had not failed to prosecute her claims and that reinstating the claims would not unfairly prejudice Respondents in any way. At the motion hearing on February 26, 2020, Petitioner's attorney explained that the four claims overlapped, and sorting out treatment and medical bills required extra trial preparation time. Moreover, Petitioner had instructed her attorney not to settle her claims, as she was uncertain whether she would require additional treatment.

Although Respondent American Gasket had forwarded proposed settlement contracts to Petitioner's counsel in July 2018, according to her attorney, Petitioner was still treating for both her back and elbow injuries at that time and was not yet in a position to consider settlement. Petitioner last saw her treating physician for her back injury in August 2018; at that time, the doctor advised her that she might require back surgery in the future. Additionally, Respondent Peapod had scheduled a §12 exam related to Petitioner's right elbow injury for December 2018. The §12 examiner was expected to apportion liability for Petitioner's condition between the two Respondents. Petitioner's counsel advised the Arbitrator that he had not wished to negotiate potential settlements until the relative liability of each Respondent had been determined.

Respondents countered Petitioner's argument that she had diligently prosecuted her case by alleging prejudice to their positions. While Petitioner delayed settlement negotiations and trial settings, evidence grew cold and witnesses scattered. Respondent Peapod dissolved its Midwest operations, adversely affecting its ability to call witnesses.

On February 26, 2020, after hearing all of the parties' arguments, the Arbitrator denied Petitioner's motion to reinstate and granted Respondent Peapod's motion to dismiss.

Petitioner filed a Petition for Review of the Arbitrator's denial of her motion to reinstate on March 12, 2020. A file-stamped copy of the Petition appears in the record. Respondent Peapod filed a motion to dismiss Petitioner's review alleging that Petitioner failed to perfect her review by serving either Peapod or its counsel timely notice of having filed a Petition for Review. Respondent American Gasket did not join in Peapod's motion to dismiss the appeal. Petitioner filed a response to Peapod's motion for dismissal of her Petition for Review and attached an affidavit from her attorney's office staff, attesting to timely preparing and mailing the Petition for Review to counsel for both Respondents.

Commissioner Parker advised the parties that the Motion to Dismiss would be taken with the case and heard at oral arguments.

CONCLUSIONS OF LAW

A. RESPONDENT'S MOTION TO DISMISS

Respondent argues that Petitioner's review should be dismissed because it did not timely receive notice of the Petitioner's Petition for Review and that Petitioner's proof of service was deficient. The Petition for Review's includes a Proof of Service page, on which Petitioner's attorney affirmed that he had "mailed with proper postage" a copy of the form "to each party at the address(es) listed below." Instead of providing the names and addresses to which the Petition was mailed, Petitioner's counsel specified "SEE ABOVE." Both Respondents' names are listed on the caption of the Petition for Review, but Respondents' counsels' names and addresses are not. While the Proof of Service is technically deficient, attached to Petitioner's counsel's response to Respondent's motion to dismiss were affidavits of two of his office assistants, one who stated that she had filed the Petition for Review on March 12, 2020 and the other who affirmed that she had mailed copies of the Petition with proper postage to both Respondents' attorneys on March 16, 2020. The record establishes that the Petition for review was timely filed on March 12, 2016 and was mailed to Respondent on March 16, 2020. Additionally, any delay in Respondent becoming aware of the existence of the Petition for Review was not prejudicial to Respondent. The record shows Respondent's counsel became aware of the petition's existence no later than May 8, 2016 when Petitioner sought to authenticate the transcript in this matter. Commissioner Parker continued the original return date on review to allow the parties to fully brief all issues in the case. The Commission denies Respondent's Motion to Dismiss.

B. MOTION TO REINSTATE

As discussed above, Petitioner's Motion to Reinstate was timely filed. Whether a case which has been dismissed for want of prosecution should be reinstated is a matter of discretion for the Arbitrator, who must apply standards of fairness and equity and consider the grounds relied upon by Petitioner, the objections of the Respondent and Commission precedent. Commission Rule 9020.90(c).

The Commission views and interprets the record differently than the Arbitrator. None of the cases had ever before been dismissed for want of prosecution. Petitioner's counsel explained that Petitioner was still treating for her injuries in 2018 and that a §12 exam was performed in December 2018. Petitioner had instructed her attorney not to resolve her cases until her treating physician established that she did not require back surgery. Petitioner's counsel also explained that it was incumbent on him to gather and review the medical records and bills to determine which applied to each injury and that this process had not yet been completed.

Based upon the foregoing, the Commission finds that the Arbitrator erred in denying Petitioner's Motion to Reinstate.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent Peapod's Motion to Dismiss Petitioner's Petition for Review of Case No. 17 WC 004557 is hereby denied.

21IWCC0005

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 26, 2020 is hereby reversed and case number 17 WC 004557 is reinstated.

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

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

DATED: JAN 5 - 2021

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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 Other (explain) Motion to Reinstate	☐ Second Injury Fund (§8(e)18)
☐ Modify Choose direction	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paola Martinez,
Petitioner,

vs.

No. 17 WC 04558
(Consol'd with 16 WC 21925
16 WC 35674
17 WC 04557)

American Gasket & Rubber Co. and Peapod, LLC.,
Respondents.

21IWCC0006

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 whether Petitioner's Petition for Review should be dismissed and whether the Arbitrator erred in denying Petitioner's Motion to Reinstate, and being advised of the facts and law, denies Respondent Peapod's Motion to Dismiss Petitioner's review and reverses the Decision of the Arbitrator as stated below. The Commission further remands this case to the Arbitrator for further proceedings.

FINDINGS OF FACT

Petitioner filed four Applications for Adjustment of Claims: two against Respondent American Gasket & Rubber Co. and two against Respondent Peapod, alleging four different dates of accident. The cases were consolidated on June 15, 2017 upon motion of Respondent Peapod.

Respondents allege that their attempts to engage Petitioner in settlement discussions were unsuccessful, and both Respondents had set the cases for hearing on multiple occasions. Petitioner continued the cases, arguing they were not ripe for trial or settlement. At the time of the Chicago call on December 18, 2019, Respondent Peapod filed a motion for trial or dismissal of the two claims filed against it, 17 WC 04457 and 17 WC 04458.

Commission Rule 9020.60(b)(2)(D)(i) requires Petitioner or her attorney to be present at the call or to timely seek a continuance if the case has risen above the red line. Petitioner's counsel failed to request a continuance or to appear at the December 18, 2019 Chicago call. The Arbitrator

set all four cases for hearing on December 23, 2019. Petitioner's attorney did not appear at the time set for hearing, and the Arbitrator dismissed the four consolidated cases on motion of Respondent Peapod.

Petitioner filed a Motion to Reinstate her four cases on December 26, 2019, arguing that she had not failed to prosecute her claims and that reinstating the claims would not prejudice Respondents in any way. At the motion hearing on February 26, 2020, Petitioner's attorney explained that the four claims overlapped, and sorting out treatment and medical bills required extra trial preparation time. Moreover, Petitioner had instructed her attorney not to settle her claims, as she was uncertain whether she would require additional treatment.

Although Respondent American Gasket had forwarded proposed settlement contracts to Petitioner's counsel in July 2018, according to her attorney, Petitioner was still treating for both her back and elbow injuries at that time and was not yet in a position to consider settlement. Petitioner last saw her treating physician for her back injury in August 2018; at that time, the doctor advised her that she might require back surgery in the future. Additionally, Respondent Peapod had scheduled a §12 exam related to Petitioner's right elbow injury for December 2018. The §12 examiner was expected to apportion liability for Petitioner's condition between the two Respondents. Petitioner's counsel advised the Arbitrator that he had not wished to negotiate potential settlements until the relative liability of each Respondent had been determined.

Respondents countered Petitioner's argument that she had diligently prosecuted her case by alleging prejudice to their positions. While Petitioner delayed settlement negotiations and trial settings, evidence grew cold and witnesses scattered. Respondent Peapod dissolved its Midwest operations, adversely affecting its ability to call witnesses.

On February 26, 2020, after hearing all of the parties' arguments, the Arbitrator denied Petitioner's motion to reinstate.

Petitioner filed a Petition for Review of the Arbitrator's denial of her motion to reinstate on March 12, 2020. A file-stamped copy of the Petition appears in the record. Respondent Peapod filed a motion to dismiss Petitioner's review alleging that Petitioner failed to perfect her review by serving either Peapod or its counsel timely notice of having filed a Petition for Review. Respondent American Gasket did not join in Peapod's motion to dismiss the appeal. Petitioner filed a response to Peapod's motion for dismissal of her Petition for Review and attached an affidavit from her attorney's office staff, attesting to timely preparing and mailing the Petition for Review to counsel for both Respondents.

Commissioner Parker advised the parties that the Motion to Dismiss would be taken with the case and heard at oral arguments.

CONCLUSIONS OF LAW

A. RESPONDENT'S MOTION TO DISMISS

Respondent argues that Petitioner's review should be dismissed because it did not timely receive notice of the Petitioner's Petition for Review and that Petitioner's proof of service was deficient. The Petition for Review's includes a Proof of Service page, on which Petitioner's attorney affirmed that he had "mailed with proper postage" a copy of the form "to each party at the address(es) listed below." Instead of providing the names and addresses to which the Petition was mailed, Petitioner's counsel specified "SEE ABOVE." Both Respondents' names are listed on the caption of the Petition for Review, but Respondents' counsels' names and addresses are not. While the Proof of Service is technically deficient, attached to Petitioner's counsel's response to Respondent's motion to dismiss were affidavits of two of his office assistants, one who stated that she had filed the Petition for Review on March 12, 2020 and the other who affirmed that she had mailed copies of the Petition with proper postage to both Respondents' attorneys on March 16, 2020. The record establishes that the Petition for review was timely filed on March 12, 2016 and was mailed to Respondent on March 16, 2020. Additionally, any delay in Respondent becoming aware of the existence of the Petition for Review was not prejudicial to Respondent. The record shows Respondent's counsel became aware of the petition's existence no later than May 8, 2016 when Petitioner sought to authenticate the transcript in this matter. Commissioner Parker continued the original return date on review to allow the parties to fully brief all issues in the case. The Commission denies Respondent's Motion to Dismiss.

B. MOTION TO REINSTATE

As discussed above, Petitioner's Motion to Reinstate was timely filed. Whether a case which has been dismissed for want of prosecution should be reinstated is a matter of discretion for the Arbitrator, who must apply standards of fairness and equity and consider the grounds relied upon by Petitioner, the objections of the Respondent and Commission precedent. Commission Rule 9020.90(c).

The Commission views and interprets the record differently than the Arbitrator. None of the cases had ever before been dismissed for want of prosecution. Petitioner's counsel explained that Petitioner was still treating for her injuries in 2018 and that a §12 exam was performed in December 2018. Petitioner had instructed her attorney not to resolve her cases until her treating physician established that she did not require back surgery. Petitioner's counsel also explained that it was incumbent on him to gather and review the medical records and bills to determine which applied to each injury and that this process had not yet been completed.

Based upon the foregoing, the Commission finds that the Arbitrator erred in denying Petitioner's Motion to Reinstate.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent Peapod's Motion to Dismiss Case No. 17 WC 004558 is hereby denied.

21IWCC0006

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 26, 2020 is hereby reversed and case number 17 WC 004558 is reinstated.

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

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

DATED: JAN 5 - 2021

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Marc Parker

Barbara N. Flores

Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

- [x] 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. 17 INC 00016,
20 WC 005525

CARMELO MICHAEL CUNETTO, Individually
and as OWNER OF C & S ENTERPRISES,
d/b/a CUNETTO'S RESTAURANT,
Respondent.

21IWCC0007

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 Respondent, alleging violations of Section 4(a) of the Illinois Workers' Compensation Act for failure to procure mandatory workers' compensation insurance. Petitioner alleges that Respondent knowingly and willfully lacked workers' compensation insurance for 986 days. The matter was set for hearing by Petitioner on Commissioner Parker's September 14, 2020 review call. Petitioner appeared via telephone. The Respondent did not appear. A compliance hearing was set and held in Collinsville before Commissioner Parker on September 21, 2020. Petitioner was represented by the Office of the Illinois Attorney General. Respondent did not appear. A record was taken.

The Petitioner sought the maximum fine allowed under the Act, $500.00 per day for each day Mr. Cunetto did business individually and as owner of C & S Enterprises d/b/a Cunetto's Restaurant and failed to provide coverage for his employees (986 days x $500.00 = $493,000.00), plus $5,827.00 which the Injured Workers' Benefit Fund paid out to Darius Golden (Respondent's injured employee) in Case No. 13 WC 13486, and $9,002.18 in unpaid insurance premiums, for a total of $507,829.18. The Commission finds that Petitioner failed to prove that Respondent received a Notice of Hearing for the September 14, 2020 hearing date and, therefore, dismisses this matter.

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Findings of Fact

The Petitioner offered the testimony of insurance investigator Michael Cummins, who testified that he had attempted personal service of Respondent at the last known address of Respondent Carmelo Cunetto on March 3, 2020. There was no response at the residence, so investigator Cummins left a copy of the Notice of Hearing attached to the front door. Investigator Cummins' affidavit of service and photographs of Respondent's residence were admitted as Petitioner's Exhibit 6. That notice of hearing provided a hearing date of May 18, 2020.

Investigator Cummins was asked if, since personal service had failed, he attempted to "mail notice" to the Respondent via certified and regular mail. He responded that he had done so and that the green cards came back indicating that Respondent had accepted them on July 29th, 2020.

Conclusions of Law

Commission Rule 9100.90(d)(1)(A) provides that notice of hearing must be served upon the employer at least 30 days prior to the time fixed for hearing and that:

> 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.

Further, the Notice of Hearing must contain, inter alia, "the time, date and place of hearing." Commission Rule 9100.90(d)(1)(B)(ii).

In this case, Petitioner attempted personal service of the Respondent as the rule requires. When personal service was unsuccessful, Petitioner, pursuant to the rule, sent "notice" via certified mail which was accepted by Respondent on July 29, 2020. However, the record does not establish that a Notice of Hearing for September 14, 2020 was contained in the documents sent to and received by Respondent via certified mail. Multiple exhibits submitted during the compliance hearing contain a Notice of Hearing for May 18, 2020. A Notice of Non-Compliance dated July 17, 2020 was also entered into evidence. However, a Notice of Hearing for September 14, 2020 was not submitted into evidence and no testimony was presented establishing that Respondent was sent and received a Notice of Hearing for that date. Because Petitioner failed to prove that it served the Respondent with a Notice of Hearing for September 14, 2020, this matter is dismissed.

IT IS THEREFORE ORDERED BY THE COMMISSION that this matter is hereby DISMISSED.

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

DATED: JAN 5 - 2021

Marc Parker

Deborah L. Simpson

Barbara N. Flores

MP/dak
r-9/21/20
68

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

- [x] 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. 18 INC 00148,
20 WC 005527

CARMELO MICHAEL CUNETTO, Individually
and as PRESIDENT OF CMCDK, INC.,
d/b/a CUNETTO'S AT THE GALAXY,
Respondent.

21IWCC0008

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 Respondent, alleging violations of Section 4(a) of the Illinois Workers' Compensation Act for failure to procure mandatory workers' compensation insurance. Petitioner alleges that Respondent knowingly and willfully lacked workers' compensation insurance for 844 days. Petitioner set a compliance hearing for September 14, 2020. Petitioner appeared by telephone. The Respondent 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. Respondent 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 Mr. Cunetto did business individually and as President of CMCDK d/b/a Cunetto's at the Galaxy and failed to provide coverage for his employees (844 days x $500.00 = $442,000.00), plus $63,477.00 which the Injured Workers' Benefit Fund paid out to Ms. Barbara Weller (Respondent's injured employee) in Case No. 13 WC 13486, and $7,705.72 in unpaid insurance premiums, for a total of $513,182.72.

The Commission, after considering the record in its entirety and being advised of the applicable law, finds that Respondent Carmelo Michael Cunetto, individually and as President of CMCDK d/b/a as Cunetto's at the Galaxy, knowingly and willingly violated Section 4(a) of the Act during the period in question. As a result, Respondent shall be held liable for non-compliance with the Act and shall pay a penalty in accordance with Section 4(d) of the Act. The Commission

hereby assesses the maximum penalty of $500.00 per day for 844 days, plus $63,477.00 in reimbursement of the Injured Workers' Benefit Fund and $7,705.72 in unpaid premiums, for a total of $513,182.72.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Investigator Cummins testified he began an investigation of Carmelo Michael Cunetto, individually and as president of CMCDK, Inc., d/b/a Cunetto's at the Galaxy, as a result of a workers' compensation claim filed against the Injured Workers' Benefit Fund by Barbara Weller. *Barbara Weller v. Mike Cunetto and Karen Sharp,* 13 WC 13486.

2. Investigator Cummins testified he searched several databases that document an employer's revenue and insurance history, including the National Council on Compensation Insurance ("NCCI") website. Petitioner's Exhibit 3 is a certified letter from NCCI verifying that Respondent was without workers' compensation from August 9, 2012 through January 10, 2015. Investigator Cummins concluded that Cunetto's at the Galaxy 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 served a Notice of Non-compliance to Respondent Carmelo Cunetto, individually and as President of CMCDK, Inc., by mail on April 18, 2018. 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.

[*Emphasis added.]*

7. Investigator Cummins testified that he attempted personal service of the March 2, 2020 Notice of Insurance Compliance Hearing on Respondent Carmelo Cunetto at his residence

on March 3, 2020. The hearing date in that notice was May 18, 2020. Respondent failed to answer the door, and the Investigator left a copy of the Notice of Hearing attached to the front door. His affidavit of service and photographs of Respondent's residence were admitted as Petitioner's Exhibit 8.

8. Investigator Cummins testified that, upon failure of his attempted personal service, a new Notice of Hearing dated July 27, 2020 was sent to Respondent by certified mail. That Notice of Hearing provided a hearing date of September 14, 2020.

9. Petitioner offered as its Exhibit 9 the certified mail receipt, showing that Respondent accepted the certified delivery on July 29, 2020. The Notice of Hearing mailed to Respondent by certified mail complies with Commission Rule 9100.90(d)(1) and contains the admonition that Respondent's failure to appear at the scheduled non-compliance 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.

10. Investigator Cummins testified that Petitioner is seeking non-compliance penalties of $500.00 per day for 844 days from August 9, 2012 through January 10, 2015, the period of non-compliance.

11. Petitioner also seeks reimbursement of the amount paid by the Injured Workers' Benefit Fund to Respondent's injured worker. The Commission's records show that the Fund paid out $63,477.00 to Barbara Weller pursuant to the Commission's decision in her claim against Respondent, 13 WC 29466.

12. In addition to the fine for non-compliance and reimbursement of the Injured Workers' Benefit Fund, Petitioner seeks unpaid insurance premiums. Investigator Cummins testified that he estimated what Respondent would have paid had he purchased workers' compensation insurance as required under the Act. The estimate is based upon the most recent workers' compensation policy for Respondent's other restaurant with a daily rate of $9.13.

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:

> any business or enterprise serving food to the public for consumption on the premises wherein any employee as a substantial part of the employee's work uses handcutting instruments or slicing machines or other devices for the cutting of meat or other food or

wherein any employee is in the hazard of being scalded or burned by hot grease, hot water, hot foods, or other hot fluids, substances or objects.

820 ILCS 305/3(14).

The Commission finds, pursuant to Section 3 of the Act, as it did in the underlying workers' compensation claim, *Barbara Weller v. Mike Cunetto and Karen Sharp,* 13 WC 13486, that the work Respondent engaged in automatically subjected it to the provisions of the Illinois Workers' Compensation Act and required it to carry workers' compensation insurance.

Regarding the issue of penalties, 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 August 9, 2012 through January 10, 2015 (844 days).

The Commission finds that Petitioner has met its burden of proving that Respondent was operating a business in Illinois, was properly served with notice, and was legally required to maintain workers' compensation insurance but failed to do so for 844 days. Respondent's failure to appear at the compliance hearing results in a finding that his failure to obtain workers compensation insurance was knowing and willful. Accordingly, the Commission finds that Respondent is liable for a penalty for failure to comply with Section 4(a) of the Act. The Commission hereby assesses against Respondent a fine of $442,000.00 for the period Respondent was without workers' compensation insurance, $63,477.00 for reimbursement of the amount paid by the Injured Workers' Benefit Fund, and $7,705.72 for unpaid premiums, for a total of $513,182.72 in civil penalties under Section 4(d) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent, Carmelo Michael Cunetto, individually and as President of CMCDK, Inc., d/b/a Cunetto's at the Galaxy, shall pay fines to the Illinois Workers' Compensation Commission in the amount of $513,182.72, as provided in Section 4(d) of the Act.

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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

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 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: JAN 5 - 2021

Marc Parker

Deborah L. Simpson

Deborah L. Simpson

MP/dak
r-9/21/20
68

Barbara N. Flores

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

DANIEL T. McALEER,

Petitioner,

21IWCC0009

vs.

NO: 11 WC 1305

EXXON MOBIL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation and temporary total disability (TTD), 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.

Although we are not persuaded by the opinion of Respondent's §12 examiner, Dr. Verma, that Petitioner reached maximum medical improvement (MMI) for his right shoulder as of January 13, 2016, we do find that Petitioner reached MMI as of the October 20, 2016 visit with Dr. Ahsan.

On January 5, 2016, Dr. Atluri recommended a cervical evaluation because, "Although the shoulder is not normal, the ongoing problem does not reflect mechanical shoulder pathology." On March 1, 2016, Dr. Atluri referred Petitioner to Dr. Rosenblatt, a neurosurgeon, for a cervical evaluation and again noted "he continues to have complaints that are not attributable to mechanical shoulder pathology."

Petitioner saw Dr. Rosenblatt on April 8, 2016 and a cervical MRI was ordered. On April 22, 2016, Dr. Rosenblatt opined there were no significant cervical abnormalities and "his current symptoms and complaints are not related to any cervical spine pathology."

On April 26, 2016, Petitioner returned to Dr. Atluri who noted that Petitioner was advised by the neurosurgeon that there were some cervical abnormalities but no lesion that was causing

his primary pain and that no specific intervention was recommended. Dr. Atluri reviewed some of Dr. Rosenblatt's notes and concluded, "I do not identify any abnormality amenable to further orthopaedic treatment." However, because Petitioner's symptoms (i.e., pain which interferes with sleep) "remain too severe for him to tolerate on a long-term basis," Dr. Atluri recommended chronic pain management. Significantly, Dr. Atluri gave 20-pound restrictions but these were only temporary until Petitioner was seen by the pain management doctor. He wrote, "I will then defer to that doctor regarding the need for further restrictions."

Petitioner first saw Dr. Ahsan, the pain management physician, on May 6, 2016, and there was no mention of any work restrictions being specifically provided to Petitioner on that date.

On May 31, 2016, Dr. Ahsan performed a cervical epidural steroid injection (CESI). As the Arbitrator noted, the law of the case is that Petitioner's cervical condition is not causally related to his accident. Dr. Ahsan wrote, "He has asked me to think about going back to work. He is not in his previous job anymore, however, he may find something with pushing and pulling a cart. I have asked him to be careful with his right shoulder and find a job which is mostly sedentary and where he has to use his left upper extremity more."

On June 28, 2016, Dr. Ahsan performed a second CESI and took Petitioner off work completely for three weeks. On July 19, 2016, Dr. Ahsan wrote, "I believe [Petitioner's] symptoms are secondary to degenerative disc changes and disc bulges at C4-5, C5-6 and C6-7." However, he also noted that Petitioner has a history of supraspinatus and labral tears and Dr. Ahsan felt Petitioner would benefit from right shoulder trigger point injections which were performed. There are no mentions of any new or updated work restrictions by Dr. Ahsan in the July 19th note or in any subsequent notes. An August 25, 2016 Athletico Initial Evaluation report states that Petitioner "is not working right now because he is afraid symptoms will get worse if he continues to work." On October 20, 216, Dr. Ahsan recommended that Petitioner get a sleep study through his primary care physician because he "may get better with the CPAP use." He also suggested the possibility of another CESI in January 2017 "since the last set of trigger point injections to the shoulder did not help him much."

We find that the 20-pound restrictions by Dr. Atluri, upon which the Arbitrator's award of TTD is based, are no longer valid. They were only temporary and have not been valid since Petitioner saw Dr. Ahsan. Furthermore, we believe the notation by Dr. Ahsan, on May 31, 2016, that he "asked [Petitioner] to be careful" with his right shoulder and that he should find a "mostly sedentary" job is not supported by objective evidence of Petitioner's capabilities. Similarly, the off-work recommendation for three weeks, given on June 28, 2016, seems to be for Petitioner's unrelated cervical radiculopathy.

The above notwithstanding, Petitioner did continue to treat with Dr. Ahsan for both his non-work-related cervical condition and work-related right shoulder condition until October 20, 2016. Although most of the treatment was for Petitioner's unrelated cervical condition, he did undergo right shoulder trigger point injections and physical therapy for the right shoulder during this time. We find that Petitioner reached MMI for the right shoulder as of his last visit with Dr. Ahsan and is entitled to TTD through that date.

We, therefore, modify the decision and award 218-6/7 weeks of TTD from December 9, 2010 through October 8, 2013 and June 12, 2015 through October 20, 2016.

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We also strike the entire fourth paragraph on page 11 of the Arbitrator's decision, beginning with "Deference" and ending with "Verma."

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,139.55 per week for a period of 218-6/7 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 $669.64 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 25% loss of use of Petitioner as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 15.375 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 31.63 weeks, as provided in §8(e)10 of the Act, for the reason that the injuries sustained caused the 12.5% loss of use of the right arm.

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: JAN 8 - 2021

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

SE/
O: 11/10/20
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McALEER, DANIEL T
Employee/Petitioner

Case# **11WC001305**

EXXON MOBIL
Employer/Respondent

21IWCC0009

On 6/12/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2095 LAW OFFICES PHILIP D BLOMBERG
11516 W 183RD ST
SUITE NE
ORLAND PARK, IL 60467

2461 NYHAN BAMBRICK KINZIE & LOWRY
KAREN A HAARSGAARD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

21IWCC0009

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

DANIEL T. MCALEER,
Employee/Petitioner
v.
EXXON MOBIL,
Employer/Respondent

Case # **11 WC 01305**

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 **May 1, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

N. ☐ Is Respondent due any credit?

O. ☐ Other

21IWCC0009

FINDINGS

On **11/17/2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current conditions of ill-being in his right shoulder, right elbow, and right wrist ***are*** causally related to the accident.

In the year preceding the injury, Petitioner earned $88,885.01; the average weekly wage was $1,709.33.

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

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

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

Respondent shall be given a credit of $**208,537.49** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**208,537.49**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**1,139.55**/week for **249** weeks, commencing December 9, 2010 through October 8, 2013 and resuming June 12, 2015 through May 1, 2017, as provided in §8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**669.64** /week for **125** weeks, because the injuries sustained caused **25%** loss of the **person-as-a-whole**, as provided in §8(d)2 of the Act.

Respondent shall also pay Petitioner permanent partial disability benefits of $**669.64** /week for **15.375** weeks because the injuries sustained caused **7.5%** loss of use of the **right hand** pursuant to §8(e)9 of the Act.

Respondent shall also pay Petitioner permanent partial disability benefits of $**669.64** /week for **31.63** weeks because the injuries sustained caused **12.5%** loss of use of the **right arm** pursuant to §8(e)10 of the Act.

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

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

Signature of Arbitrator

June 12, 2018
Date

ICArbDec p. 2

JUN 12 2018

biceps long head tenodesis. Dr. Atluri's post-surgical diagnoses included right shoulder superior labral tear (SLAP 2), subacromial impingement, partial thickness rotator cuff tear (supraspinatus), and biceps long head tendon instability.

Petitioner had post-operative physical therapy at ATI Physical Therapy (PX #4). Petitioner had a valid FCE October 22, 2013. Petitioner demonstrated functional capabilities at the MEDIUM-to-HEAVY physical demand level. The assessment specialist noted petitioner was a fuel delivery truck driver but that no job description was available at the time of the assessment. Relying on US Department of Labor dictionary of occupational titles the assessment specialist found petitioner's described employment at the MEDIUM physical demand level (up to 50 pounds occasional lifting).

Petitioner consulted Dr. Atluri on October 29, 2013 advising his shoulder was much better but for occasional pain that woke him up at night. The clinical evaluation demonstrated no atrophy. There was no crepitus on range of motion testing although range of motion was diminished. There was no instability, there was no pain on cross-arm maneuver or Hawkins maneuver or Yergason's maneuver. Supraspinatus and infraspinatus strength were 4/5. Dr. Atluri released Petitioner to unrestricted work.

Petitioner returned to Dr. Atluri November 5, 2013 with complaints of increased right shoulder pain after lifting some boxes. The findings on clinical examination where the same as those on October 29. Dr. Atluri noted no obvious change in the overall clinical picture and continued with unrestricted work status and no need for further therapy.

Petitioner returned January 20, 2014. He had resumed work and was performing well-tolerated activities with some soreness in both elbows. The clinical presentation was unchanged. On April 22, 2014 Petitioner reported that he was still working but had some elbow soreness when using the gearshift of his truck. He reported he was no longer driving large tanker trucks. The clinical exam was significant for normal strength in the supraspinatus and infraspinatus, although range of motion in the right shoulder was still diminished. Dr. Atluri administered a steroid injection but also continued Petitioner for unrestricted work.

On May 13, 2014 Petitioner saw Dr. Dr. Atluri again, reporting that the injection gave relief for only one day. On clinical exam Dr. Dr. Atluri noted a painful click with load and shift maneuver (superior labrum). Dr. Atluri ordered an MR arthrogram of the right shoulder. The July 31, 2014 MR arthrogram demonstrated supraspinatus, infraspinatus, and subscapularis tendinopathy, type II superior labral tear (SLAP), and intact bicep tendon (PX #3 & PX #5). On July 29, 2014 Dr. Atluri reviewed the MR arthrogram with Petitioner. Dr. Atluri noted the poor quality of the MRI which was inadequate to establish a diagnosis. He found the study suspicious for a persistent

labral tear and discussed a diagnostic arthroscopy or an MRI of better quality. Petitioner opted for another MRI.

The repeat MR arthrogram was performed February 6, 2015 (PX #3). The findings included a small partial thickness posterior supraspinatus tear, a suspected glenoid labral tear, and minimal degenerative changes in the acromioclavicular joint. Dr. Atluri reviewed the more recent MR arthrogram with petitioner February 10, 2015. Dr. Atluri noted Petitioner's benign exam. He administered another steroid injection in the subacromial joint but still released Petitioner to unrestricted work.

On March 3, 2015 Dr. Atluri he discussed surgical alternatives. On June 2, 2015 a final decision for repeat arthroscopy was made. On June 12, 2015 Dr. Atluri performed a right shoulder arthroscopic superior labral tear and debridement of partial rotator cuff tear. Petitioner followed with Dr. Atluri post-operatively through 2015, while receiving post-operative therapy. Dr. Atluri he kept Petitioner off work until July 14, 2015, when Petitioner was released for work restricted to 5 pounds lifting/pulling/pushing.

On September 1, 2015, Petitioner told Dr. Atluri his function had improved but that he still had pain behind his shoulder at night and soreness after therapy. He did not have elbow pain. On exam Petitioner had improved shoulder motion. Dr. Atluri recommended home therapy and released to a 5-pound restriction. On October 27, 2015 Petitioner reported that he was awakened by pain in the right side of the neck traveling into the trapezius. Dr. Atluri ordered a cervical MRI.

Petitioner saw Dr. Atluri January 5, 2016 with complaints of increased pain. Petitioner reported that nothing was relieving his symptoms. On exam Dr. Lurie found normal strength and no atrophy in the shoulder. Motion was diminished but there was no pain on Hawkins of Yergason's. Dr. Adler he recommended a cervical MRI and a spine evaluation. On February 2, 2016, Dr. Atluri again found normal strength and no atrophy in Petitioner's right shoulder. Petitioner still had limited motion but normal strength. There was no pain on Hawkins of Yergason's. Dr. Atluri continued the 5-pound restriction and continued his recommendation a cervical spine evaluation. On March 1, 2016, Dr. Atluri noted Petitioner's continues to have complaints that are not attributable to mechanical shoulder pathology." Dr. Atluri referred Petitioner to Dr. Szymon Rosenblatt and continued the 5-pound restrictions.

Petitioner saw Dr. Rosenblatt April 8, 2016 (PX #9). Dr. Rosenblatt noted Petitioner's history of multiple right upper extremity surgeries including two right shoulder surgeries, right ulnar nerve decompression, and right carpal tunnel release. Petitioner gave a history of his work injury November 17, 2010 and that he had been dropped from work in 2015 because of the 5-pound restriction. Petitioner complained occasional neck pain but mostly pain in the right shoulder right elbow. He had numbness in the index and middle fingers. Petitioner reported that he sleeps 1 to 3

hours a night because of right shoulder pain. 3 or 4 cortisone injections in 2011 provided temporary relief.

On exam Dr. Rosenblatt noted decreased range of motion in the cervical spine. Arm and shoulder muscle strength were normal on the right but for 4/5 biceps and triceps strength. There was no muscle atrophy. Dr. Rosenblatt diagnosed an unspecified injury of right shoulder and upper arm and recommended a cervical spine MRI. Petitioner returned to Dr. Rosenblatt April 22, 2016. The clinical exam was unchanged from the previous visit. Dr. Rosenblatt found no significant abnormalities in the cervical MRI. He assured Petitioner that his current sentencing complaints were not related to any cervical spine pathology and referred Petitioner back to Dr. Atluri.

Dr. Atluri last evaluated Petitioner on April 26, 2016. Petitioner reported he had seen the neurosurgeon who informed him there were some abnormalities in his cervical spine. The clinical exam was essentially normal but for some limitation in shoulder motion. Dr. Atluri noted that no further orthopedic care was necessary and referred him to Dr. Mohammad Ahsan for pain management. He gave Petitioner temporary work restrictions of 20 pounds until evaluated in pain management.

Petitioner was evaluated by Dr. Ahsan on May 6, 2016 (PX #10). Petitioner complained of right-sided neck pain radiating into the shoulder and right scapular region. He also complained occasional right elbow pain. Dr. Ahsan noted Petitioner's history of surgeries to his right shoulder and elbow and carpal tunnel petitioner rated his pain at 5/10. Dr. Ahsan noted the April 15, 2016 cervical MRI revealed mild degenerative changes at C4–5 and minor disc bulging. MRI imaging of the right shoulder February 6, 2015 revealed a small partial-thickness supraspinatus tear, suggestive labral tearing, and minimal degenerative AC joint changes.

On exam Dr. Ahsan noted normal cervical spine motion and normal shoulder motion except for external rotation limited by pain. Muscle strength was normal as was the sensory neurological exam. Dr. Ahsan discussed differential diagnoses of neck related pain including discogenic pain, facet pathology related pain, spinal stenosis related pain, and referred pain. Dr. Ahsan noted Petitioner was not a candidate for interventional management at that time.

Dr. Ahsan performed epidural injections at C6-7 May 31 and June 28, 2016. Dr. Ahsan referred Petitioner for additional physical therapy. Dr. Ahsan also administered trigger injections to right shoulder muscles July 19, 2016. The injections provided minimal relief. At the last visit on October 20, 2016, Petitioner's exam was essentially unchanged. Petitioner still had pain when he turns to the right and sleeps on his right side. Dr. Ahsan recommended a sleep study and commented Petitioner may improve with a CPAP machine.

Respondent called Jay An as a witness. Mr. An works as a private investigator for 4GS Compliance and Investigations. He conducted video surveillance of Petitioner on November 17, November 18, and November 21, 2015. The video CD, Respondent's Exhibit #2, was admitted in evidence. Mr. An testified that his surveillance on November 17 produced no pertinent evidence.

Surveillance of Petitioner on November 18, 2015 recorded him wearing work gloves, using a "shop vac", carrying a bag of sand, using a hose, and filling a gap in the cement, all in an unrestricted fashion. On November 21, 2015 Petitioner was recorded using a snow blower, which he acknowledged on rebuttal he had to push and was getting stuck, as well as shoveling snow, with no apparent discomfort.

Petitioner testified he is presently not working and admitted he has only applied for one position which he then opted not to pursue as it was too far away and he wanted to solely pursue treatment options. He acknowledged receiving Social Security benefits for unrelated medical conditions between July of 2011 and March of 2014. Petitioner continues to take Gabapentin, which helps him fall asleep but does not help him remain in that state, as well as Zanaflex.

Petitioner testified that he has not received any medical attention since October 2016. He presently does laundry, cooks, and completes light construction such as cleaning gutters and installation of storm window screens. Petitioner testified that his condition has not improved even after his therapy, injection, and surgeries.

At Respondent's request orthopedic surgeon Dr. Nikhl Verma reviewed Petitioner's medical records. Dr. Verma reviewed Petitioner's records from Alexian Brothers, Dr. Bang, Petitioner's primary care physician and Dr. Atluri. Dr. Verma also reviewed diagnostic imaging including the MR arthrogram on July 23, 2014 and the repeat arthrogram on February 6, 2015 with attendant MRI on February 6. Dr. Verma prepared a narrative report April 20, 2015 (PX #1A) in which he recounted petitioner's history and care.

Dr. Verma noted Petitioner's history of a work-related accident on November 17, 2010. He noted Dr. Atluri's care which included right carpal tunnel release and right cubital tunnel release. Dr. Verma also noted Dr. Atluri's care for Petitioner's right shoulder SLAP tear and rotator cuff tear for which Dr. Atluri operated on April 19, 2013 Dr. Verma also noted the November 29, 2013 FCE after which Petitioner was released to full duty work on a trial basis.

Based on his review of medical records and diagnostic films Dr. Verma did not see evidence of a new injury. He noted there was no documentation to suggest an injury mechanism that consistent with Petitioner's persistent complaints of pain or a recurrent labral tear. Dr. Verma further noted that Petitioner had findings typical of a labral

abnormality following surgery. He noted the difficulty in identifying a recurrent labral here versus normal postsurgical changes. Dr. Verma added that outcomes of revision labral tear surgery are extremely poor.

At Respondent's request Dr. Verma conducted a §12 IME of Petitioner's right shoulder January 13, 2016 (PX #1B). Petitioner recounted his original report of injury on November 17, 2000 and, at which time he was pulling a hose and felt a jerk and acute pain in his elbow he subsequently developed burning pain went down into the left hand and into the shoulder. Petitioner also reported persistent shoulder pain which led to two shoulder procedures. Petitioner recounted persistent right shoulder pain which disrupted sleep.

On examination Dr. Verma noted Petitioner's normal cervical motion without reproducing shoulder symptoms. Dr. Verma found reduced motion in the right shoulder. He found normal strength and no evidence of instability. O'Brien sign was negative; Speed and Yergason tests were also negative; negative impingement signs were noted. Dr. Verma diagnosed status post right shoulder SLAP repair and revision SLAP repair persistent subjective nighttime complaints. He related Petitioner's diagnoses to Petitioner's work injury on November 17, 2010. Dr. Verma found Petitioner's objective exam normal which made the etiology of current subjective complaints unclear. Dr. Verma stated he found no reason for a cervical MRI. He opined that Petitioner was at MMI and that Petitioner could return to his normal occupational status based on the current normal objective examination.

CONCLUSIONS OF LAW

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

Arbitrator Carlson previously found causal connection between Petitioner's work accident on November 17, 2010 and the injuries Petitioner sustained to his right shoulder, right arm, and right wrist. Petitioner had carpal tunnel release surgery and cubital release surgery on February 3, 2012. Petitioner had conservative care for his right shoulder, including steroid injection injections and physical therapy, which did not provide relief. Petitioner had arthroscopic surgery on his right shoulder April 19, 2013 and again on June 12, 2015.

The reasonableness and necessity of Petitioner's medical care is not disputed. What is disputed is whether Petitioner's current condition is causally related to the work accident. After weighing conflicting evidence and opinions the Arbitrator finds that Petitioner proved that his current condition of ill-being in his right shoulder is causally related to the work accident on November 17, 2010.

There is no dispute that Petitioner sought medical intervention for his work injuries in a reasonable and timely fashion. He followed the advice and recommendations of his treating orthopedic surgeon, Dr. Prasant Atluri, for conservative care for his right shoulder which did not provide relief. Ultimately, Dr. Atluri performed arthroscopic surgery to repair a SLAP tear and a rotator cuff tear. Despite that surgical intervention Petitioner's complaints of right shoulder pain and limitation persisted to the point where Dr. Atluri operated again to repair Petitioner's right shoulder.

At trial Petitioner testified to his continuing complaints and limitations, particularly his inability to return to work for Respondent due to restrictions established by Dr. Atluri. Those restrictions initially limited Petitioner to 5 pounds lifting/pulling/pushing. The restrictions were later revised to 20 pounds. An FCE was performed October 22, 2013, which noted Petitioner could work at a HEAVY to MEDIUM demand level, noting that Petitioner's job was at a MEDIUM demand level. However, no FCE was performed after Petitioner's second surgery on June 12, 2015.

Petitioner's right shoulder was examined at Respondent's request pursuant to §12 of the Act by orthopedist Dr. Nikhl Verma. Dr. Verma opined that at the time of his examination on January 13, 2016 Petitioner was at MMI and was capable of returning to full duty work. Petitioner was still under Dr. Atluri's 20-pound restrictions at that time. Dr. Verma offered no opinions regarding Petitioner's right wrist or right elbow injuries.

Deference is commonly accorded to the opinions of treating physicians over those of retained examining physicians. Treating physicians generally have a broader and more comprehensive scope of understanding of a patient's condition than an examining physician who often has a snapshot from a single clinical examination. Treating physician goals tend to differ from the goals of retained examining physicians. Treating physicians seek to cure or relieve the effects of their patient's injuries. Examining physicians tend to be retained for purposes of defense of employees' claims. In weighing these interests, the Arbitrator finds the opinions of Dr. Atluri more persuasive than the old opinions of Dr. Verma.

In addition, recent surveillance of Petitioner demonstrated physical activity involving both arms without apparent limitation or discomfort. Evidence on surveillance contradicts Petitioner's testimony at trial but not to the extent that prevented petitioner from bearing his burden of proof. The surveillance does diminish the assessment of Petitioner's permanent partial disability as discussed below.

As noted above, it was stipulated that Petitioner's complaints relating to the cervical spine were not causally related to the accident.

Again, the Arbitrator finds that Petitioner was credible in describing his current complaints and limitations and therefore proved that his current condition of ill-being in his shoulder is causally related to his work accident on November 17, 2010.

K: What temporary benefits are in dispute? TTD

In light of the Arbitrator's finding that Petitioner's current condition of ill being is causally related to the work accident the arbitrator finds that Petitioner proved that he is entitled to temporary total disability benefits from December 9, 2010 through October 28, 2013 and from June 12, 2015 through May 1, 2017, 249 weeks.

L: What is the nature and extent of the injury?

The Arbitrator's findings regarding causation are adopted and incorporated here.

It was not disputed that Petitioner's injury to his right wrist required carpal tunnel release surgery. Petitioner did not testify to any significant complaints. There are no documented ongoing complaints in petitioner's medical records. The Arbitrator finds that Petitioner sustained a loss of 7.5% of his right hand due to injuries sustained in his work accident on November 17, 2010.

It was not disputed that Petitioner's injury to his right elbow required cubital tunnel release surgery. Petitioner testified at trial that he had continuing pain and limitation relating to his right elbow. There was some documentation in later medical records of those continuing complaints. The Arbitrator finds that Petitioner sustained a loss of 12.5% of the right of his right arm due to injuries sustained in his work accident on November 17, 2010.

Petitioner sustained a more significant injury to his right shoulder. Conservative treatment, including physical therapy and cortisone injections, failed to provide relief. Petitioner had arthroscopic repair of a torn rotator cuff and a SLAP tear in his right shoulder April 19, 2013. Petitioner's pain and limitations persisted to the point where he had a second arthroscopic surgery for a SLAP tear and debridement of a rotator cuff tear. Petitioner's treating orthopedic surgeon, Dr. Atluri, placed 20-pound lifting/pushing/pulling work restrictions, which limit Petitioner's ability to return to his former employment with Respondent. Petitioner has been unsuccessful in finding comparable work.

Despite this course of medical intervention Petitioner remains symptomatic and limited in his ability to use his right arm. His daily life, particularly sleep, has been disrupted. The Arbitrator must note that any surgery, particularly two operations, will alter the architecture and limit the function of any joint. The joint will never be the same as before. Accordingly, the Arbitrator finds that Petitioner sustained a loss of 25%

of a person-as-a-whole due to injuries sustained to his right shoulder in his work accident on November 17, 2010.

June 12, 2018

Steven J. Fruth, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PATRICK SANKO,

Petitioner,

vs. NO: 17 WC 004978

ALDRIDGE ELECTRIC, INC.,

Respondent.

21IWCC0010

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 29, 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.

21IWCC0010

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 $121,173.00. 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: JAN - 8 2021
KAD/bsd
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Thomas J. Tyrrell

Barbara N. Flores

DISSENT

I respectfully dissent from the majority. I would vacate the award of temporary total disability (TTD) benefits and find that Petitioner did not accept, or even reply to, an ongoing offer of job accommodation from Respondent, and therefore, has not sustained his burden of proving that he is entitled to an award of TTD benefits based upon the following:

Temporary Total Disability

> [W]hen 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. 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 if the employee refuses work falling within the physical restrictions prescribed by his doctor. *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

> This court has held, "[t]he duration of TTD is controlled by the claimant's ability to work and his continuation in the healing process." *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087,1090, 666 N.E.2d 827, 829, 217 Ill. Dec. 158 (1996)

Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n, 2014 IL App (3d) 130028WC, P23, 14 N.E.3d 16, 22, 2014 Ill. App. LEXIS 454, *10, 383 Ill. Dec. 184, 190, 2014 WL 2895455

> This court has upheld Commission decisions to deny TTD benefits after finding that the claimant voluntarily ceased working. See *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090-91, 666 N.E.2d 827, 217 Ill. Dec. 158 (1996) (upholding decision to deny TTD benefits beyond date claimant took a disability retirement where there was no evidence that claimant could not return to light-duty work); *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 887, 559 N.E.2d 526, 147 Ill. Dec. 353 (1990) (three physicians released claimant to light-duty work, and no medical evidence corroborated claimant's testimony that she could not work at the light-duty job employer offered)... In the cases just cited, the Commission chose to rely on evidence that the claimant could have worked but instead chose not to [****38] [**595] work.

Land & Lakes Co. v. Indus. Comm'n (Dawson), 359 Ill. App. 3d 582, 595, 834 N.E.2d 583, 594-595, 2005 Ill. App. LEXIS 873, *25-26, 296 Ill. Dec. 26, 37-38

In the case at bar, the Majority awarded Petitioner TTD from February 13, 2017, through March 22, 2019. The Arbitrator noted that the disputed period of TTD was from April 10, 2017, through March 22, 2019, the last date before the hearing. (ArbDec. 15, AX1, 2)

Petitioner testified on cross-examination that he was working light-duty from the day after the first accident took place on November 9, 2016, through the remainder of the calendar year 2016, and that for the first six weeks of 2017 he worked for Respondent, although he could not recall exactly the date that they stopped paying him. (12/27/18T. 42) He was receiving full pay and getting his union benefits. (12/27/18T. 43)

Petitioner testified that he was off work starting on February 13, 2017, and through the date of the Arbitration Hearing. (12/27/18T. 27) The trial stipulations reflect that Petitioner was paid TTD beginning February 13, 2017, through April 9, 2017. The Petitioner was discharged from right foot physical therapy on March 22, 2017, with right ankle goals met. (RX8) The therapy records show Petitioner had the same range of motion in both his right and his left foot at that time of 5/5 and similar strength between the injured right foot and Petitioner's left. *Id.* On April 4, 2017, Petitioner was seen for a §12 Evaluation with Dr. Kevin Walsh. (RX5) Dr. Walsh opined that Petitioner had reached MMI with regard to his Achilles tendinitis. Dr. Walsh observed Petitioner was able to walk unassisted and Petitioner had no physical findings that would limit Petitioner's daily activities and that Petitioner could resume his preinjury work duties. (Rx5)

Dr. Hilgers released Petitioner from his care on April 5, 2017, and opined he could work 40 hours per week sedentary work. It was noted that Petitioner was seeking approval for referral to a podiatry/foot physician. (PX2; 12/27/18, T. 46)

Petitioner was first seen by Dr. David Garras on May 23, 2017. After reviewing a right lower leg MRI, Dr. Garras recommended right ankle surgery in June 2017. Petitioner could not recall if Dr. Garras changed Dr. Hilger's restriction. (12/27/18T. 28) Dr. Garras testified that Petitioner could work with restrictions; specifically, that he would work full-duty in a non-construction job, full-time. (PX3, 45-46)

Howard Sutton was called as a witness by Respondent's attorney. Sutton testified that he is employed by Respondent as a superintendent for the Highway Division and he manages the field labor. He described Petitioner as a "previous employee and, actually, a good friend of ours, yes. I have known him for over 25 years." (2/19/19T. 7) Sutton further testified that he knew that Petitioner suffered an injury in November of 2016 and that Petitioner was working modified or light duty for Respondent thereafter. He described the modified duty as driving a truck-a crash attenuator vehicle following the crews around that were doing splicing, setting poles, pulling wire. "His job was just to have that truck in position as a safety barrier for the crews. So his job detail was to pick up a truck in the morning from the staging area, drive it out to the site, lower the back attenuator, which is done electronically, and turn the lights on and remain in the truck until the crew is ready to pick up." (2/19/19T. 7-8) Sutton testified that Petitioner would only have to get out of the truck to use the restroom or take a break. (2/19/19T. 8-9)

Sutton further testified that they tried to make it easy so that Petitioner "wasn't picking anything up or doing anything strenuous." They had Petitioner doing that for several months. (2/19/19T. 9) Sutton then testified he had received a text message from another crew member that the Petitioner stopped coming in sometime in 2017 and the next time that he heard from Petitioner was when he received a phone call from Petitioner sometime in March 2017. (2/19/19T. 10) Petitioner left a message or voicemail. Sutton testified that he tried calling back. It was the one and only time Sutton ever heard from Petitioner. (2/19/19T. 10) Sutton testified that he left Petitioner a message prior to Petitioner's message to him. In his phone message Sutton asked the Petitioner what the situation was and advising "I don't know what your future plans are here, but I can keep you busy until you retire." (2/19/19T. 24-25) Petitioner never called him back.

On rebuttal, Petitioner testified that he received the message from Sutton saying he could keep him busy working until he retired. (2/19/19T. 29)

Sutton testified that he called Petitioner's credit card off and his phone off because Petitioner no longer was taking his calls. Sutton testified he left the message "probably whenever he stopped coming in (to work) in February" or March.

Sutton testified that Petitioner never came back to him to ask for work. Sutton further testified that typically, if someone is reaching out for work, they will call the foreman. Sutton testified he has five or six foreman that work for him. Sutton verified with all his foremen that no one was contacted by Petitioner. Petitioner did not reach out to any of the foremen that Sutton worked with. (2/19/19T. 10-11)

Sutton added that because the work involves road work, January through March are slow months, however, April and May he starts "hiring guys," so usually the foreman will have contact from the field guys calling them; and Sutton brings them on as they are available to start work. Sutton confirmed Petitioner never contacted him during 2017 or 2018 asking for work. (2/19/19T. 15) Sutton testified that the same light duty work was available in 2018, in fact, "that work is always available for all our guys. We constantly have crash trucks—We call them attenuators or crash trucks. They are always available and they're always in operation." (2/19/19T. 13-15)

Petitioner testified that since he stopped working in 2017, he had not called Respondent looking for work. (2/19/19T. 31) Petitioner acknowledged that the conversation that he had with Sutton about Workers' Compensation occurred around the time he allegedly suffered a knee injury. Petitioner could not recall if he ever spoke to Mr. Sutton in the Spring of 2017, however, he did not call Mr. Sutton or anyone from Respondent when he was released by Dr. Hilgers in the Spring of 2017. (2/19/19T. 33-34)

Petitioner applied for Social Security Disability Insurance (SSDI) and was awarded benefits commencing December 2017. (RX12) Given the fact that Petitioner never reached out or responded to Sutton, or any foreman, or to the Respondent after a 25 year relationship and receiving a message that Sutton/Respondent could keep him busy until retirement, it is obvious that Petitioner voluntarily took himself out of the job market. Therefore, I would vacate the TTD award and affirm all else.

Kathryn A. Doerries

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

SANKO, PATRICK
Employee/Petitioner

Case# **17WC004978**

ALDRIDGE ELECTRIC INC
Employer/Respondent

21IWCC0010

On 4/29/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.40% 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. 21IWCC0010

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

5317 CASTANEDA LAW OFFICE
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514 W STATE ST SUITE 210
GENEVA, IL 60134

3227 HOLECEK & ASSOCIATES
STUART PELLISH
PO BOX 64093
ST PAUL, MN 55164

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

PATRICK SANKO
Employee/Petitioner

v.

ALDRIDGE ELECTRIC INC.
Employer/Respondent

Case # **17** WC **004978**

Consolidated cases: _____

21IWCC0010

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **BRIAN T. CRONIN**, Arbitrator of the Commission, in the city of **CHICAGO**, on **12/28/18, 2/19/19** and **3/22/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 9, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**93,724.28**; the average weekly wage was $**1,802.39**.

On the date of accident, Petitioner was **56** 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 is entitled to a credit of $**13,396.37** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**13,396.37**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $**1,201.59**/week commencing on **February 13, 2017** and carrying through **March 22, 2019**, which represents a period of **109-5/7** weeks, pursuant to Section 8(b) of the Act.

Respondent shall receive a credit of $**13,396.37** for TTD benefits paid.

Medical benefits

Respondent shall pay Petitioner for the reasonable and necessary medical services of $**2,106.96** from Homer Glen Open MRI, and $**530.51** from Midwest Orthopedic Consultants, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

Prospective Medical Care

The Arbitrator orders Respondent to authorize an updated MRI of Petitioner's right foot/ankle and an appointment with Dr. Garras. If, after examining Petitioner and reviewing the MRI results Dr. Garras finds that "the same problems continued to be symptomatic", and recommends the same surgery, the Arbitrator orders Respondent to authorize such surgery.

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

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

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

Signature of Arbitrator

4/28/2019
Date

APR 29 2019

FINDINGS OF FACT

On November 9, 2016, Patrick Sanko (hereinafter "Petitioner") was employed by Aldridge Electric Company (hereinafter "Respondent"). He was a Union member. His job duties included digging trenches, laying pipe and pulling wire. Petitioner testified that at the time of trial, he was 5 feet 10 inches tall and weighed 300 pounds.

On November 9, 2016, Petitioner suffered a work-related injury to his right foot. Respondent does not dispute that Petitioner suffered this accidental injury. Petitioner had climbed up a 5-foot tall partial wall to undo a box through which wire needed to be pulled. As he was sliding down the wall with both feet on the wall, he struck his right foot at the bottom at which point it bevels, and his foot bent backwards. Petitioner felt and heard a pop in his right foot.

Petitioner then reported the injury to his foreman and continued to work the remainder of his shift. As he worked, he noticed that his right foot was sore. He went home that evening but did not seek treatment for his right foot.

On November 10, 2016, Petitioner was seen at Dreyer Clinic. He complained of right calf pain. He was assessed with a muscle strain of his right ankle. (PX #2, p. 3) He was directed to ice his foot and to wear a CAM boot. He was permitted to return to work with restrictions of limited standing or walking. No pain medication was prescribed.

The November 11, 2016 chart note indicates Petitioner's surgical history includes a right MCL repair in 2004. (PX #2, p. 17) Petitioner began using a lace-up ankle brace on his right foot/ankle.

Petitioner participated in physical therapy three times a week at Dreyer Clinic. He testified that the therapy helped to relieve the swelling and pain in his right ankle.

On December 15, 2016, Lindsey J. Baumgartner, P.T., indicated a diagnosis of (1) Achilles tendinitis of right lower extremity (2) Difficulty walking (3) Muscle weakness. Physical Therapist Baumgartner also wrote the following: "SUBJECTIVE: Patient states that his heel has been feeling better if he wears the boot. Per patient, he has been getting sore with working due to sitting for long periods of time." (PX #2, p. 106)

On January 3, 2017, Physical Therapist Baumgartner recorded the following subjective complaints: "Patient reports that his foot has been feeling about 70% better overall. Per patent, he had a week in which he was able to rest and feels that this was beneficial to his foot/achilles. Patent states that he was actually feeling so good that he was able to walk 25 minutes on the treadmill and did not have increased soreness/pain afterwards." (PX #2, p. 144)

On January 4, 2017, during the review of systems, Dr. Hilgers and Nurse Benes noted the following:

> "Musculoskeletal: PAIN: Location: rt. knee, lt. knee and rt. heel. Aggravated by: weight bearing." (PX #2, p. 156)

On January 19, 2017, Physical Therapist Baumgartner recorded the following subjective complaints: "Patient reports that his heel has been feeling good, but he has noticed some soreness through the front of his right leg. Per patient, he has been walking more on the treadmill and feels that this has been helping to get more cardio activities." (PX #2, p. 209)

On January 23, 2017, Petitioner reported the following subjective complaints to his physical therapist:

> "Patient states that his ankle has been feeling good but it is still slightly sore to the touch. Patient reports that he has been walking on the treadmill for about 30-40 minutes per day but experienced knee pain this morning." (PX #2, p. 215)

The Assessment/Treatment Response that day included the following notation:

"Patient's response to treatment: minimal tenderness persists with manual therapy; patient unable to perform all exercises secondary to right medial knee pain this morning." (PX #2, p. 217)

On January 26, 2017, Petitioner reported the following subjective complaints to his physical therapist:

> "Patient reports that he still has some tightness in his left calf but it is feeling better. Per patient, he is having a lot of right knee pain and is unable to do much in terms of standing, walking or exercising due to this." (PX #2, p. 221)

On January 30, 2017, Petitioner reported the following subjective complaints to his physical therapist:

> "Patient states that his ankle has been feeling better but he is experiencing pain in the right knee. Per patient, when going down the stairs this weekend, he caught his left toe and then jammed all of his weight into his right knee and felt more pain in the knee. Patient reports that he does not feel that he is able to go back to work because of the knee pain. (PX #2, p. 227)

Petitioner remained under the care of Marc Peter Hilgers, M.D., in the Orthopaedic Department of Dreyer Clinic. Petitioner was last seen by Dr. Hilgers on April 5, 2017. Dr. Hilgers directed Petitioner to continue icing his foot. Dr. Hilgers permitted him to return to full-time, sedentary work.

On April 4, 2017, at the request of Respondent and pursuant to Section 12 of the Act, Petitioner presented to Kevin F. Walsh, M.D., for an examination. Dr. Walsh is associated with DMG Orthopaedics. His April 9, 2017 report was admitted into evidence. (RX #5) Dr. Walsh took a history, conducted a physical examination and reviewed treating medical records from Dreyer Clinic.

Dr. Walsh noted that Petitioner weighed 344 pounds. His physical examination of Petitioner revealed an excellent range of motion of the right foot with full dorsiflexion of 20 degrees and full plantarflexion of 45 degrees. Petitioner was found to have 5/5 motor strength in dorsiflexion and plantarflexion. (RX #5)

Dr. Walsh did not take issue with the diagnosis of Achilles tendinitis made by Dr. Hilgers. Dr. Walsh was of the opinion Petitioner had reached maximum medical improvement ("MMI") with regard to the Achilles tendinitis he sustained on November 9, 2016. (RX #5)

Dr. Walsh noted Petitioner reported a 60% to 70% improvement of his right foot. Dr. Walsh observed that Petitioner was able to walk unassisted. He opined that there were no physical findings that would limit Petitioner's daily activities. Dr. Walsh noted that the fusiform swelling of the Achilles tendon would be consistent with a diagnosis of Achilles tendinitis. Dr. Walsh also noted that the fusiform swelling of the Achilles tendon was consistent with a degenerative process. He opined Petitioner's residual symptoms were related to degeneration in the Achilles tendon that was exacerbated by Petitioner's morbid obesity. Dr. Walsh opined Petitioner could resume his pre-injury work duties. (RX #5)

Petitioner chose to be seen by David N. Garras, M.D., an orthopedic surgeon who is associated with Midwest Orthopaedic Consultants. Petitioner did not recall how he came to see Dr. Garras. Petitioner first saw Dr. Garras on May 23, 2017. Dr. Garras conducted a physical examination. He noted that the range of motion of the right ankle was intact with tightness of the Achilles tendon in dorsiflexion. He found strength in the right ankle to be 5/5. (PX #1)

On May 24, 2017, MR images of Petitioner's right lower leg were taken. Such images revealed normal right tibia and fibula. (RX #9) MR images were also taken of his right ankle, which were interpreted as showing Achilles tendinosis. (RX #10)

Petitioner returned to Dr. Garras on June 6, 2017. Dr. Garras proposed that Petitioner undergo a right ankle arthroscopy and debridement, with possible microfracture, possible syndesmotic repair, lateral ligament reconstruction and excision of an avulsion fragment, peroneal debridement and repair with possible tenodesis and os trigonum excision. (PX #1)

Petitioner testified he wishes to proceed with the recommended surgery.

Dr. Garras told Petitioner that this surgery would not address his Achilles tendon, which he opined would likely get better with physical therapy and bracing rather than with surgical intervention.

Dr. Garras testified via deposition. He acknowledged that Petitioner could be working in a full-time, sedentary position. (PX #3)

Petitioner testified that since June 6, 2017, he has not returned to Dr. Garras. Prior to November 9, 2016, Petitioner testified, he has had no injuries to his right foot or ankle. He also testified that subsequent to November 9, 2016, he has experienced no injuries to his right foot or ankle.

Petitioner testified that while working for Aldridge, he did not work 40 hours every week. Weeks in which he worked fewer than 40 hours were attributable to either the weather or possible sickness. He testified that he took maybe three sick days and no vacation days during the year prior to the accident.

Petitioner testified that he has not worked for any employer since February 13, 2017. He further testified that he stopped working for Respondent because Howard Sutton recommended it. He testified that Mr. Sutton told Petitioner that they can no longer accommodate him and that he needs to start collecting workers' compensation. Petitioner further testified that Mr. Sutton told him that because Petitioner was having problems with his knee locking up.

Petitioner testified he was aware that Dr. Hilgers placed him on sedentary work restrictions. He did not recall if Dr. Garras changed those restrictions.

Petitioner testified that he has not been contacted by Respondent since February 13, 2017. His job search consisted of one contact with an unidentified excavating company. He did not fill out a job application.

Petitioner testified that he is not taking any pain medications. He testified of continued numbness, swelling and discomfort in his right foot. He is able to drive a vehicle, but when driving for more than 20 minutes, he notices stiffness and discomfort in his right foot.

Petitioner lives in a second-floor apartment. After climbing the stairs to his apartment, he experiences discomfort in the foot. He is able to dress himself, bathe himself, feed himself, do his own laundry and go grocery shopping.

Petitioner is a diabetic and taking medication for diabetes twice daily. He does not take insulin. He suffers from elevated blood pressure, for which he takes medication daily. At the time of the November 9, 2016 accident, Petitioner's Primary Care Physician was Jean Walsh, M.D. Prior to the November 9, 2016 accident, Petitioner underwent surgery on his right knee. He could not remember the name of the doctor who performed the knee surgery.

Petitioner currently receives Social Security Disability Income of $1,253.00 monthly. He has not applied for any disability benefits from his Union. He took a distribution from his Union retirement plan. Such plan was funded by him and his employer.

Petitioner testified that he has not spoken with his supervisor, Howard Sutton, since being released to return to work in April 2017. The last time he spoke with Mr. Sutton was in February 2017, prior to his release to work by Dr. Hilgers.

On redirect examination, Petitioner testified he is not working anywhere. He acknowledged he has not called Respondent for work. He further acknowledged that after Dr. Hilgers released him to return to full-time, restricted work, he has not contacted Mr. Sutton looking for work. Since his release by Dr. Hilgers, Petitioner's only effort to obtain work was from one truck company, whose name he could not remember.

Mr. Howard Sutton testified. He is Respondent's superintendent for the Highway Division in the collar counties. He manages Respondent's field labor. He described Petitioner as a good friend; they have known each other for over 25 years.

Mr. Sutton testified that subsequent to the November 2016 accident, Petitioner was working a light-duty position by driving a crash attenuator truck. He would drive the truck and follow work crews that were splicing, setting poles and pulling wires on highway projects. Petitioner job was to place the truck in a position as a safety barrier for the work crews.

Petitioner would retrieve a truck in the morning from the staging area. He would drive the truck to the work area, electronically lower the back attenuator, turn the lights on, and remain in the truck until the crew was ready to be picked up. From the time he picked up the truck to the time when he returned it to the staging area, except for his personal needs to go to the washroom or get something to eat, there would be no business reason for Petitioner to exit the truck. Mr. Sutton testified Petitioner was not required to lift anything or to do anything strenuous in conjunction with driving the crash attenuator truck.

Mr. Sutton testified that Petitioner stopped coming into work in early 2017. He testified that in March 2017, he received a telephone message from Petitioner. He returned Petitioner's call but was unable to reach him. Mr. Sutton testified that except for one call in March 2017, he has not heard from Petitioner.

Mr. Sutton testified that roadwork projects pick up in the Spring and that he typically hires employees in April and May. Employees who had previously worked for Respondent and who are interested in returning back to work for Respondent would typically contact their foreman and advise him of their availability to work. If additional individuals were needed to be hired, Mr. Sutton testified he would contact Local 196 and ask which Union members were on either Book 1 or Book 2.

Book 1 identifies local Union members who are looking for work. Book 2 identifies members of other Union locals who are looking for work. However, in order to receive an assignment from either Book, one must be 100% physically capable of performing the full duties of an equipment operator.

Mr. Sutton testified that when he contacted Local 196 in April and May 2017, Petitioner was not in either Book as someone who was looking for work.

Except for the one call in March 2017, Mr. Sutton testified, through the date of hearing, Petitioner has never contacted him or any of the foreman to look for work.

Mr. Sutton testified there is a constant need for attenuators or crash truck drivers. Mr. Sutton testified from March 2017 to the time of hearing, other employees of Respondent had driven these trucks.

On direct examination, Mr. Sutton testified to the following:

Q: And subsequent to 2017 or the beginning of 2017, had you ever been contacted by Mr. Sanko looking for return to come back to work?

A: I got a call in - - I think it was in March, somewhere around that timeline, 2017; and he left a message. I tried calling back. He either left a message or had a full voicemail. I'm not sure. It was a while back, but it was the only one time I have ever heard from him as far as trying to reach out to me. (T. 2/19/19, p. 10)

Then on cross-examination, Mr. Sutton testified to the following:

Q: And when was he terminated?

A: When he stopped calling me, I - - Once he stopped calling me - - I left him a message prior to his message asking what the situation was; and then he should recall, I said, I don't know what your future plans are here, but I can keep you busy until you retire because he stopped coming in. That was the message I left him. He never called me back after that. So, I called his phone off, and called his credit card off because he was no longer taking my calls. (T. 2/19/19, pp. 24-25)

On redirect examination, Mr. Sutton testified to the following:

Q: Mr. Sutton, just one point of clarification. You left him a message, am I correct, that said you could keep him busy until he retired?

A: Yeah. He's a friend. I didn't want him to take the wrong path. It sounded like he was just not wanting to work. So I left a message saying, Pat, give me a call back. I want to know what your plans are.

Q: And the work that would have been available to him when you say they'd keep him working, that would have all have been as a Union electrician or a Union operator?

A: Yeah. He wasn't doing his scope that his job title requires. I was giving him light duty work at the time, but he didn't come in. I don't know what his situation was at the time, but he wasn't coming in anymore and he didn't take my calls at that point; so I more or less just figured he was just moving down a different path.

Q: After you left him that message in which you said that you have work and you could keep him busy until he retires, did Mr. Sanko ever reach out to you?

A: Not at that point, no. I got a call months later just saying, give me a call.

Q: So the last contact you had with him would have been the beginning of April or end of March?

A: Correct.

Q: And since that time, he's never come in and looked for work?

A: He's never contacted myself or any of my foremen that typically would be contacted if a member or an employee was looking for work. (T. 2/19/19, pp. 25-27)

In rebuttal, Petitioner testified to the following:

Q: And after you saw Dr. Hilgers in March of 2017, do you recall receiving a message from Mr. Sutton saying that he'd keep you working until you retired?

A: Yes.

Q: And did you agree to go back to work light duty at that time?

A: No, it wasn't for light duty.

Q: What was it for?

A: It was just so I wouldn't file Workmen's Comp.

Q: What do you mean?

A: Well, I had found out about - - after the MRI and I said that I had another injury; and he said, well, if you are going to go in - - because they were paying out of their pocket from the company, and then he said to go to Workmen's Comp. (T. 2/19/19, pp. 29-30)

CONCLUSIONS OF LAW

In support of his decision with regard to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator finds as follows:

When Dr. Marc Peters Hilgers last saw Petitioner on April 5, 2017, he offered the following updated Past Medical History:

"Patient Active Problem List

Diagnosis

- HTN (hypertension)
- Hyperlipemia (sic)
- Hypothyroid
- Diabetes type 2, controlled (HCC)
- Sleep apnea

- Right ankle pain
- Pain in Achilles tendon
- Achilles tendinitis
- BMI 40.0 - 44.9, adult (HCC)
- Localized osteoarthritis of right knee
- S/P medial meniscectomy of right knee
- Difficulty walking
- Muscle weakness
- Achilles tendinitis of right lower extremity" (PX #2)

Dr. Kevin F. Walsh and Dr. David N. Garras have offered causation opinions.

In a report dated April 9, 2017, Dr. Walsh stated:

"He does have a history of an arthroscopy of his knee with a partial medial meniscectomy from a previous work-related event. X-rays were obtained. He was told he had bone-on-bone changes in the right knee and osteoarthritis …

"He does have some fusiform swelling of his Achilles tendon, consistent with a diagnosis of Achilles tendinitis …

Certainly, the fusiform swelling of the tendon is consistent with a degenerative process. Although the patent could injure his Achilles tendon with the injury described, a forced dorsiflexion, it is not likely at all that his current symptoms at this time are still causally related to the event in November 2016. Any residual symptoms at this time may be related to degeneration in the Achilles tendon, exacerbated by the patient's morbid obesity.

The patient's knee condition is unrelated to the injury described. The patient denies a pre-existing condition regarding his Achilles tendon. Nevertheless, morbidly obese patients can develop tendinosis as a result of their obesity."
(RX #5)

Dr. Walsh's causation opinion with regard to Petitioner's Achilles tendinitis is not persuasive. At what point did Petitioner's Achilles tendinitis that resulted from the injury *end* and his Achilles tendinitis that resulted from degeneration and morbid obesity *begin*?

Dr. Walsh reviewed medical records, including physical therapy records, from Dreyer Clinic. Because an MRI of Petitioner's right ankle was not taken until after Dr. Walsh examined him, Dr. Walsh did not have the benefit of reviewing the MRI results.

Dr. Walsh is a general orthopedic surgeon. In his curriculum vitae, he cites continuing medical education from 1984 – 2009, as well as committee and community work. However, there

is no indication that Dr. Walsh has conducted or published *any* research, let alone research on the foot and ankle.

Moreover, it is well established in Illinois workers' compensation law that a claimant need not prove that the work injury was the primary or principle cause, but merely *a* cause, of the condition of ill-being.

Dr. Garras first saw Petitioner on May 23, 2017. He examined Petitioner and ordered an MRI of the right ankle and the right lower leg. He advised Petitioner to perform a home exercise program, and to rest, elevate and ice his right foot. (PX #1)

Petitioner returned to Dr. Garras on June 6, 2017. Upon Petitioner's return, Dr. Garras examined Petitioner and obtained x-rays of his right knee, right tibia/fibula and right ankle. Dr, Garras reviewed the diagnostic test results with Petitioner. Dr. Garras then offered the following impression:

1. Right Achilles mid substance and insertional tendinosis
2. Right anterior tibial pain
3. Right foot metatarsalgia
4. Right knee degeneration of the medial compartment
5. Right plantar fasciitis
6. Right os trigonum syndrome
7. Right ankle instability, ATFL avulsion fracture off of the talus and syndesmotic sprain. (PX #1)

Dr. Garras testified that all seven of the conditions included in the above impression "may or could have been caused by the mechanism and the accident that he had in November of 2016." (PX #3, p. 25)

With regard to Petitioner's right knee degeneration, Dr. Garras explained how that might or could be causally related to the November 9, 2016 injury:

> "If he landed hard on his heel coming down that five foot wall (that) could easily have transferred up the leg. Additionally, if he is having problems walking because of his Achilles that could also complicate his pre-existing knee arthritis. I want to be clear. The arthritis didn't happen because of his injury. It's an aggravation of a pre-existing condition, and it's actually pretty clear because he has got the same kind of arthritis on the other knee and it's not symptomatic." (PX #3, p. 16)

On cross-examination, Dr. Garras testified that hypothyroidism could cause muscle cramping. He testified that plantar fasciitis can certainly be caused by excessive weight and ill-fitting shoes, as well as by other factors. Dr. Garras testified that the os trigonum bone typically becomes inflamed as a result of trauma. Dr. Garras testified that Petitioner told him he did not have any prior injuries to his right foot but acknowledged that in January (2017), Petitioner caught his toe and jammed his knee and foot. Dr. Garras testified that such toe-catching incident could

have very well be an explanation for the inflammation of the os trigonum if such inflammation was not present before that incident. (PX #3, pp. 51-55)

On redirect examination, Dr. Garras testified that he did not believe Petitioner's hypothyroidism caused any muscle cramping. (PX #3, p. 55) He testified that inflammation of the os trigonum would commonly result in complaints of pain in the back of the ankle. Then, Dr. Garras testified to the following:

Q: And any change in your opinions regarding the plantar fasciitis, or the other conditions you have indicated today regarding the possibility of other causes?

A: Again, I haven't seen any evidence that any of this pre-existed the injury, or didn't exist between the November and January injury, so I don't have a change of opinion. (Id., pp. 55-56)

On recross examination, Dr. Garras testified that Petitioner did not have a plantar flexion injury.

Dr. Garras is an orthopedic surgeon who has been fellowship-trained in foot and ankle surgery. He devotes 95-97% of his practice to the foot and ankle. (PX3, p. 6) His curriculum vitae exhibits his peer-reviewed journal articles and full-length presentations, as well as his peer-reviewed abstracts, posters and presentation, most of which focus on the foot and ankle. (PX #3, Dep. Ex. 1) Dr. Garras had the benefit of reviewing the MRI of the right ankle and lower leg. Although he did not review the chart notes of Dreyer Clinic, he did review the Dreyer diagnostic test results.

The Arbitrator notes that on April 13, 2017, Petitioner told Dr. Jean L. Walsh, his primary care physician, that he has experienced knee pain since his on-the-job injury last November. Yet, there is no documentary evidence to support this claim. The first documented complaints of right knee pain were recorded on January 4, 2017. On that day, during the review of systems, Dr. Hilgers and Nurse Benes noted the following:

> "Musculoskeletal: PAIN: Location: rt. knee, lt. knee and rt. heel. Aggravated by: weight bearing." (PX #2, p. 156)

On February 10, 2017, Petitioner reported the following to Sandra T. Labak, D.O.: "Early January patient was at work and twisted with his foot planted." (PX #2, p. 265) Petitioner testified to the same event. Yet, Petitioner did not provide such a history to his treaters at Dreyer Clinic on January 3rd, January 4th, January 5th, January 10th, January 11th, January 16th, January 19th, January 23rd, January 26th, January 30th, January 31st, February 1st, or February 8th.

After carefully reviewing all the evidence, the Arbitrator concludes that Petitioner's right knee, osteoarthritic condition was aggravated on January 23, 2017 following days of walking 30-40 minutes on the treadmill. The Arbitrator makes the reasonable inference that Petitioner was walking on the treadmill to rehabilitate his right ankle. The Arbitrator finds that the January 30, 2017 event in which he was going down the stairs over the weekend, caught his left toe and then

jammed all of his weight into his right knee and felt more pain in the knee, was not an intervening accident. Please see *Vogel v. Indus. Comm'n*, 354 Ill. App. 3d 780 (2005).

The Arbitrator finds the opinions of Dr. Garras to be more persuasive than those of Dr. Kevin Walsh.

Therefore, the Arbitrator finds that the seven conditions of ill-being that Dr. Garras identified on June 6, 2017 are causally related to the accident of November 9, 2016.

In support of his decision with regard to issue (G) "What were Petitioner's earnings?", the Arbitrator finds as follows:

The Arbitrator, having reviewed the wage exhibit of Petitioner and Respondent, and in accordance with the applicable case law, finds and concludes that Petitioner earned $1,802.39 for the year next preceding his injury of November 9, 2016. As the Appellate Court recently noted, "an employee's average weekly wage is determined on the basis of the employee's actual regular earnings divided by the number of weeks actually worked if the employee lost five or more calendar days of employment during the year preceding his injury." *Labuz v. Illinois Workers' Comp. Comm'n,* 981 N.E.2d 14, 25 (1st Dist. 2012) citing *McCartney v. Indus. Comm'n,* 529 N.E.2d 250 (4th Dist. 1988). Here, the wage records clearly revealed that there were weeks when Petitioner did not work a 40-hour work week. (PX #5, p. 4) (For example: 1/3/16 – 16 hrs.; 1/10/16 – 32 hrs.; 1/24/16 – 22 hrs.). In reviewing these records, the Arbitrator can reasonably infer that Petitioner lost five or more calendar days from work. "Even without evidence of the precise amount of the claimant's total lost time, we concluded that it was clearly established that the claimant had not worked a full 52 weeks …" *Labuz v. Illinois Workers' Comp. Comm'n,* 981 at 25. Petitioner also testified that prior to his accident, he did not work 40 hours every week. (T. 24) Petitioner's unrebutted testimony indicated that he would work fewer than 40 hours either because of the weather or because Petitioner was ill. (T. 25) Petitioner recalled that he had no more than three sick days in the prior year and no vacation days. (T. 25)

On cross-examination, Petitioner confirmed that he if he did not work a 40-hour work week and he was not ill, Petitioner's absence was due to weather conditions at which time no one at the company worked. (T. 54)

The Arbitrator calculated a total of 42 weeks worked based upon the following wage record information obtained from the exhibits:

Payroll ending date	Hours Worked	Rate of Pay	Earnings
11/15/2015	40	41.03	1641.2
11/22/2015	40	41.03	1641.2
11/29/2015	24	41.03	984.72
12/6/2015	40	41.03	1641.2
12/13/2015	40	41.03	1641.2
12/20/2015	40	41.03	1641.2
12/27/2015	18	41.03	738.54
1/3/2016	16	41.03	656.48
1/10/2016	32	41.03	1312.96
1/17/2016	16	41.03	656.48
1/24/2016	22	41.03	902.66
1/31/2016	40	41.03	1641.2
2/7/2016	32	41.03	1312.96
2/14/2016	26	41.03	1066.78
2/21/2016	40	41.03	1641.2
2/28/2016	16	41.03	656.48
3/6/2016	32	41.03	1312.96
3/13/2016	40	41.03	1641.2
3/20/2016	40	41.03	1641.2
3/27/2016	34	41.03	1395.02
4/3/2016	40	41.03	1641.2

4/10/2016	32	41.03	1312.96
4/17/2016	40	41.03	1641.2
4/24/2016	40	41.03	1641.2
5/1/2016	40	41.03	1641.2
5/8/2016	40	41.03	1641.2
5/15/2016	32	41.03	1312.96
5/22/2016	40	41.03	1641.2
5/29/2016	40	41.03	1641.2
6/5/2016	32	41.03	1312.96
6/12/2016	40	41.03	1641.2
6/19/2016	40	41.03	1641.2
6/26/2016	39	41.03	1600.17
7/3/2016	32	41.03	1312.96
7/10/2016	26	41.03	1066.78
7/17/2016	40	41.03	1641.2
7/24/2016	32	41.03	1312.96
7/31/2016	40	41.03	1641.2
8/7/2016	40	41.03	1641.2
8/14/2016	32	41.03	1312.96
8/21/2016	40	41.03	1641.2
8/28/2016	40	41.03	1641.2
9/4/2016	40	41.03	1641.2
9/11/2016	40	41.03	1641.2

9/18/2016	40	41.03	1641.2
9/25/2016	40	41.03	1641.2
10/2/2016	40	41.03	1641.2
10/9/2016	40	41.03	1641.2
10/16/2016	40	41.03	1641.2
10/23/2016	40	41.03	1641.2
10/30/2016	40	41.03	1641.2
11/6/2016	40	41.03	1641.2
			75700.35

Based upon a 42-week period for the period next preceding the injury, the Arbitrator calculates an average weekly wage of $1,802.39 [$75,700.35 divided by 42]. Petitioner's corresponding TTD rate is $1,201.59 and PPD rate of $775.18 (maximum).

In support of his decision with regard to issue (L) "What temporary benefits are in dispute? TTD", the Arbitrator finds as follows:

The Arbitrator has reviewed all of the medical evidence and has listened carefully to the testimony of Petitioner and Mr. Sutton. Petitioner was permitted to return to full-time, sedentary work by both Dr. Hilgers and Dr. Garras. Dr. Walsh was of the opinion Petitioner could be working full, unrestricted duty.

No physician has opined Petitioner is totally disabled from all gainful employment. Mr. Sutton testified that sedentary work driving the attenuator crash truck was available for Petitioner subsequent to his release by Dr. Hilgers on April 5, 2017.

On cross-examination, Petitioner testified that he went out of the cab and up into the cab 50 times a day, but that was on the track hoe or the plow machine, not on the attenuator (crash) truck.

When Petitioner worked light-duty, he was only in the attenuator (crash) truck. Accordingly, the evidence indicates that he would get in and out of the truck each day when picking up and dropping off the truck, when setting out and collecting the orange cones, when using the restroom, taking lunch, and taking breaks.

Petitioner testified that after his release by Dr. Hilgers, he never contacted Mr. Sutton nor anyone else from Respondent to be placed on full-time, sedentary work. Petitioner testified that

except for a single contact with an excavating company, he made no effort to seek full-time work from any other employer.

The Arbitrator notes that the disputed periods of temporary total disability are from April 10, 2017 through the last date of hearing on this claim of March 22, 2019. (AX #1, p. 2) The Arbitrator heard conflicting testimony as to the reasons that Petitioner stopped working light duty in late January or early February of 2017. Petitioner testified that his supervisor, Howard Sutton, recommended he not work anymore. (T. 28) Petitioner also confirmed that Respondent did not contact him any further after February 13, 2017, and that Petitioner had no further contact with Respondent. (T. 47) Petitioner clarified on redirect examination that his supervisor told him to "go on workmen's comp." (T. 67) On cross-examination, Petitioner also clarified that Petitioner's conversation with Mr. Sutton wherein Petitioner was advised his employer could no longer accommodate his restrictions occurred before he started to receive workers' compensation benefits at the end of January and early February. (T. 73)

Respondent's witness, Mr. Howard Sutton, testified that Petitioner stopped coming into work in 2017. (T. 2/19/19, p. 10) Mr. Sutton confirmed that when Petitioner stopped coming into work there was no change in the doctor's note, i.e., one that was different from any prior doctor's note. (T. 2/19/19, p. 20) Mr. Sutton also confirmed that since March of 2017, he has not contacted Petitioner to come back to work light duty. (T. 2/19/19, p. 23) Mr. Sutton also confirmed that Petitioner is no longer an employee of the company and that he was terminated when Petitioner "stopped calling me." (T. 2/19/19, p. 24) Mr. Sutton identified this period of termination in February or March of 2017 – "however long it was he worked 'til." (T. 2/19/19) However, on redirect examination, Mr. Sutton claimed that the last contact he had with Petitioner occurred at the beginning of April or the end of March 2017. (T. 2/19/19, p. 26)

An employee is temporarily totally disabled "from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107 (1990). The dispositive question is whether the claimant's condition had "stabilized." *Manis v. Industrial Commission*, 230 Ill.App. 3d 657 (1st Dist. 1992). As the Appellate Court noted in *Manis*, an argument focusing on whether the claimant is available for work in some other capacity and could and should have sought alternative employment misses the mark in TTD cases. *Manis*, 230 Ill.App.3d at 660. Among the factors to be considered in determining whether a claimant has reached maximum medical improvement include a release to return to work, with restrictions or otherwise, and medical testimony or evidence concerning claimant's injury, the extent thereof, the prognosis, and whether the injury has stabilized. *Beuse v. Indus. Comm'n*, 299 Ill.App.3d 180 (1st Dist. 1998).

Here, the only persuasive medical evidence established that Petitioner's condition of ill-being had not yet stabilized. At the time that Petitioner began receiving workers' compensation benefits on or about February 13, 2017 (AX #1, p. 2), Petitioner continued to receive physical therapy at the Dreyer Medical Clinic. (PX #2, pp. 288-422). On April 5, 2017, although Respondent continued to refer to this date as a "discharge" date, the treating physician, Dr. Hilgers, noted that Petitioner's condition had not stabilized as he stated, "I will send him to podiatry/foot and ankle surgery for a consultation with *option to treat.*" Emphasis added.)

(PX #2, p. 452) After Dr. David Garras, a foot and ankle surgeon, examined Petitioner, he recommended an MRI and eventually surgery. Only Dr. Kevin Walsh opined as of April 4, 2017, that Petitioner had reached maximum medical improvement.

The Arbitrator finds the opinions of Dr. Hilgers and Dr. Garras that Petitioner had not reached maximum medical improvement regarding his work-related condition to be more persuasive based on the ongoing treatment and evaluations from November 11, 2016 through June 6, 2017. The Arbitrator finds the opinions of Dr. Hilgers and Dr. Garras that Petitioner's condition had not yet stabilized to be more persuasive than those of Dr. Walsh.

The Arbitrator also finds the testimony of Petitioner regarding his discontinuation of work to be more credible than that of Respondent's witness, Mr. Sutton. In support of this finding the Arbitrator notes the following:

1. Petitioner testified that while he was on light duty, he occasionally worked one or two days, but he was paid a full 40 hours by Respondent (T. 43);

2. Respondent's witness, Mr. Sutton, testified that Petitioner was terminated as an employee. The Arbitrator notes that even accepting the conflicting testimony of Mr. Sutton as to when this occurred (he testified on cross that it was in February or March of 2017 – however long it was that he worked - but on redirect testified his last contact with Petitioner occurred at the end of March or beginning of April). Petitioner would have no reason to contact Respondent after his consultation with Dr. Hilgers on April 5, 2017 if he were already terminated.

The Arbitrator finds it inconceivable that Petitioner would voluntarily leave a light-duty position in which he was paid a 40-hour week for sometimes one to two days of work driving a truck and then be unresponsive to an offer of accommodated work. By the time of Dr. Walsh's examination when he released Petitioner to return to full-duty work, Petitioner had already been terminated according to Respondent's witness.

The termination of petitioner by respondent does not relieve the respondent of paying temporary total disability benefits if the petitioner's condition had not yet stabilized. *Interstate Scaffolding v. Illinois Workers' Compensation Commission,* 923 N.E. 2d 266 (2010).

Since the Arbitrator finds Dr. Kevin Walsh's opinions unpersuasive, and since Respondent's witness testified that he did not contact Petitioner after his last day of work, the Arbitrator finds that Petitioner is entitled to receive temporary total disability benefits as his condition had not yet stabilized.

Based upon the above, the Arbitrator finds and concludes that Petitioner is entitled to receive temporary total disability benefits commencing on February 13, 2017 and carrying through March 22, 2019, which represents a total period of 109-3/7 weeks at a rate of $1,201.59 per week.

In support of his decision with regard to issue (J) "Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?", the Arbitrator finds as follows:

When Petitioner was released by Dr. Hilgers in April 2017, he still had complaints of pain and discomfort in his right foot. Dr. Walsh opined the ongoing symptomatology was attributable to a degenerative process in the Achilles tendon that was exacerbated by Petitioner's morbid obesity.

The Arbitrator concludes that Petitioner acted appropriately in seeking a second opinion as to his condition of ill-being and the available medical options.

Therefore, the Arbitrator finds Respondent is liable to pay the office visit charges of Dr. Garras/Midwest Orthopedic Consultants, in the amount of $530.51, and the charge for the MRI from Homer Glen Open MRI in the amount of $2,106.96, all pursuant to Section 8(a) and subject to Section 8.2 of the Act.

In support of his decision with regard to issue (K) "Is Petitioner entitled to any prospective medical care?", the Arbitrator finds as follows:

Both Dr. Kevin Walsh and Dr. Garras agree Petitioner suffered a dorsiflexion injury when he came down the five-foot wall. Dr. Walsh opines Petitioner is at MMI and needs no more medical care. Dr. Hilgers did not prescribe surgery to Petitioner's right foot/ankle. Dr. Garras, noting the continued complaints of pain, opined additional medical care is needed.

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

> The employer shall provide and pay the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule, subject to Section 8.2, in effect at the time the service was rendered for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury, even if a health care provider sells, transfers, or otherwise assigns an account receivable for procedures, treatments, or services covered under this Act. If the employer does not dispute payment of first aid, medical, surgical, and hospital services, the employer shall make such payment to the provider on behalf of the employee. The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is

unable to be self-sufficient the employer shall further pay for such maintenance or institutional care as shall be required.

Dr. Garras has not seen Petitioner since June 6, 2017. The Arbitrator finds this problematic. The Arbitrator has no current medical reports that demonstrate the surgery proposed nearly two years ago is necessary to currently relieve Petitioner of his right foot pain.

During direct examination, Dr. Garras himself raised the possibility the proposed surgery is no longer necessary:

Q. Have you seen Mr. Sanko since June 6th of 2017?

A. No, sir.

Q. Okay. And if there was a decision where Mr. Sanko would undergo that surgery, would you need to see him again before anything else occurred?

A. Absolutely.

Q. And what would be the reason you would need to see him?

A. I would want to make sure that all of his – the same problems continued to be symptomatic. I would actually recommend getting a new MRI since it has been almost a year, just to make sure that these problems are still problems. I don't want to go in blind.

(PX #3, pp. 30-31)

The Arbitrator orders Respondent to authorize an updated MRI of Petitioner's right foot/ankle and an appointment with Dr. Garras. If, after examining Petitioner and reviewing the MRI results Dr. Garras finds that "the same problems continued to be symptomatic", and recommends the same surgery, the Arbitrator orders Respondent to authorize such surgery.

In support of his decision with regard to issue (K) "Should penalties or fees be imposed upon Respondent?", the Arbitrator finds as follows:

It is true that Dr. Hilgers and Dr. Garras released Petitioner to full-time, sedentary work. However, the Arbitrator concludes that no penalties or fees are warranted because there was a bona fide dispute as to the reason Petitioner discontinued working for Respondent. There was also a bona fide dispute as to whether the aggravation of Petitioner's right knee condition stemmed from the November 9, 2016 accident or the related treatment he received thereafter. In disputing Dr. Garras charges and the MRI bill, Respondent relied on the opinions of Dr. Kevin Walsh.

Brian T. Cronin
Arbitrator

4-28-2019
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF DuPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

IVAN IVANOV,

Petitioner,

21IWCC0011

vs. NO: 15 WC 25006

TECH AUTO SERVICE, INC. &
ILLINOIS TREASURER AS *EX OFFICIO* CUSTODIAN OF
THE INJURED WORKERS' BENEFIT FUND,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Petitioner and Respondents herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability benefits, medical expenses, the denial of penalties and fees, and the nature and extent of Petitioner's 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.

Petitioner alleged, and Respondent Tech Auto Services, Inc. stipulated, that Petitioner sustained a work-related accident on July 20, 2012. At that time, Petitioner was working for Tech Auto as a mechanic and a piece of muffler fell on his left hand. Petitioner suffered a deep laceration in his hand, an open metacarpal fracture and transections of a nerve and tendon. He required debridement surgery, surgical repair of a nerve and tendon, and surgical removal of metallic bodies in the hand. At the hearing, Petitioner and Tech Auto stipulated that Petitioner was off work for 7&3/7 weeks due to his work-related injury and that Tech Auto paid all TTD benefits for the period of time Petitioner was off work. The Arbitrator denied any medical award, found Petitioner was not entitled to TTD, awarded Respondent an §8(j) credit for medical payments made by Wellcare and ordered Respondent to hold Petitioner harmless for any claims made by insurance providers,

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and denied Petitioner's demand for penalties and fees. Finally, the Arbitrator awarded Petitioner 30.75 weeks of PPD benefits representing loss of the use of 15% of his left hand.

The Commission agrees with the conclusions and analysis of the Arbitrator on the issues of accident, causal connection, and the denial of the imposition of penalties and fees. We affirm and adopt those aspects of the Decision of the Arbitrator.

On the issue of temporary total disability benefits, the Arbitrator found that Petitioner did not sustain his burden of proving that he was entitled to such benefits. He noted that Petitioner did not provide off-work notes and he was doing some work as a mechanic in his home garage. The Arbitrator also noted that even if Petitioner were entitled to TTD, his claim would be in the amount of $2,496.50 and he was paid TTD benefits amounting to $2,923.25. The Commission views the matter differently. The principal parties stipulated that Petitioner was off work for 7 & 3/7 weeks, that Respondent paid all TTD owed and was entitled to a credit for the TTD paid. Consistent with the principal parties' stipulation, the Commission awards Petitioner 7&3/7 weeks of TTD and awards Respondent a credit for TTD paid. No additional TTD benefits are awarded.

On the issue of medical bills, the Arbitrator denied any medical award finding that Petitioner had not proven that there was any outstanding balance due. He further found Respondent was entitled to an 8j credit for medical bills paid by Wellcare and ordered Respondent to hold Petitioner harmless for said amounts. The Commission disagrees. While acknowledging that the exhibit of medical bills is very confusing, as are the sources of payments and any alleged outstanding balance, the Commission finds that Petitioner is entitled to an award for the bills paid by any source other than Tech Auto for the reasonable and necessary medical treatment bills related to his injury at work at the negotiated and paid amounts reflected in the record. *See, Tower Automotive v. I.W.C.C.*, 407 Ill. App. 3d 427 (1st Dist. WC Div. 2011).

The Commission finds that Petitioner is also entitled to an award for unpaid bills, if any, pursuant to §8(a) and §8.2 of the Act. Thus, the Commission hereby clarifies that Respondents are liable for all medical bills that have been incurred to treat Petitioner's work-related injury to the extent paid by another payor (as negotiated or reduced) or pursuant to §8(a) and §8.2 of the Act if still outstanding. In addition, the record reflects that Respondent Tech Auto paid some bills directly to providers and that the providers were not paid by any group insurance maintained by Tech Auto. Therefore, Tech Auto is not entitled to an §8(j) credit and is not required to hold Petitioner harmless for amounts paid by any insurance provider. This finding is consistent with the principal parties' stipulation on the request for hearing form. Tech Auto is, however, -entitled to credit for all payments it made on account of the work-related accident/injury, including for medical bills, to the extent reflected in the record.

The Arbitrator awarded Petitioner 30.75 weeks of PPD benefits representing loss of the use of 15% of the left hand. The Arbitrator gave greater weight to the fact that the medical records indicated that Petitioner had gained the majority of functionality of his left thumb and hand and he was released to work without restrictions. The Arbitrator gave no weight to Petitioner's occupation

or reduction of future earning potential because he returned to work as a mechanic. The Arbitrator also noted Petitioner was an older worker at the age of 65 at the time of the accident and he retired at age 68, soon after his injury. Therefore, the Arbitrator gave lesser weight to that factor. Finally, the Arbitrator gave greater weight to the fact that Petitioner stopped treating in September 2012 and had expressed no complaints at that time.

The Commission agrees generally with the analysis of the Arbitrator regarding the PPD award. Nevertheless, the Commission notes that Petitioner had some residual pain, numbness, and stiffness in his left hand following his surgery and post-operative treatment. The Commission believes that Petitioner should be entitled to a somewhat larger PPD award because his work as mechanic is very hand intensive and his work would be made more difficult and uncomfortable because of the injury. In addition, although he retired, Petitioner testified he still did some mechanic work in his garage using his injured hand.

In looking at the entire record before us, the Commission finds an award of 41 weeks representing loss of the use of 20% of the left hand is appropriate in this claim. Accordingly, the Commission modifies the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondents shall pay to the Petitioner the sum of $426.75 per week for a period of 7&3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have a credit for TTD paid. No additional TTD is awarded.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents shall pay to Petitioner all medical expenses that have been paid by any source other than Tech Auto, at a negotiated or reduced rate, plus out-of-pocket expenses, if any, pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents pay to Petitioner the remaining unpaid reasonable and necessary medical expenses incurred to treat Petitioner's work-related condition of ill-being, if any, under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondents shall pay Petitioner permanent partial disability benefits of $337.50 a week for a period of 41 weeks because the injuries sustained caused the 20% loss of the use of the left hand as provided in §8(e) of the Act.

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

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

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IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for the removal of this cause to the Circuit Court by Respondents is hereby fixed at the sum of $25,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 11 2021

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/dw
O-11/19/20
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0011

IVANOV, IVAN D
Employee/Petitioner

Case# **15WC025006**

TECH AUTO SERVICE INC AND ILLINOIS WORKERS' BENEFIT FUND
Employer/Respondent

On 8/21/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.84% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4084 LAW OFFICE TIMOTHY DEFFET
5875 N LINCOLN AVE
SUITE 231
CHICAGO, IL 60659

0159 FRANCIS J DISCIPIO LAW OFFICE
JOHN S MAGIERA
1200 HARGER RD SUITE 500
OAK BROOK, IL 60521

5604 ASSISTANT ATTORNEY GENERAL
DAVID CHRISTENSEN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

21IWCC0011

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

Ivan D. Ivanov
Employee/Petitioner

v.

Tech Auto Service, Inc and Illinois Workers Benefit Fund
Employer/Respondent

Case # **15** WC **25006**

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 **Wheaton**, on **June 25, 2019 and June 27, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ 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 **Liability of the Illinois Worker Benefit Fund**

21IWCC0011

FINDINGS

On **July 20, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$29,250.00**; the average weekly wage was **$562.50**.

On the date of accident, Petitioner was **65** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$2,923.25** for other benefits, for a total credit of **$2,923.25**.

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

ORDER

Petitioner's claim for Temporary Compensation is Denied

Petitioner's claim for unpaid Medical is Denied. 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 $337.50/week for 30.75 weeks, because the injuries sustained caused the 15% loss of the Left Hand, as provided in Section 8(e) of the Act.

Petitioner's claim for Penalties and Attorney's fees is Denied

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Signature of Arbitrator

August 20, 2019
Date

AUG 21 2019

Statement of Facts 21IWCC0011

Trial was held on June 26, 2019. Timothy Deffet represented Petitioner. Attorney John Magiera represented Respondent Tech Auto. The Illinois Attorney General's Office represented the IWBF. On motion of Petitioner, proofs were reopened on June 27, 2019 (Arb. Ex. 5). At that time, PX 11A was offered to replace PX 11 and admitted.

Petitioner testified in Bulgarian through an interpreter, Edmond Tchilian. He testified that on July 20, 2012, he was 65 years old, married with no dependent children. Petitioner was an auto mechanic for Tech Auto located at 658 Ogden Ave. Downers Grove, Illinois. Petitioner was hired by Dan Chen, the owner of Tech Auto, in February 2006. Petitioner completed an application for employment, a W-4 and I-9 forms (PX 9). His job duties included general auto repair work and the use of welders and torches. Petitioner testified that he also did work on the side at his home. He testified the number of cars he would work on varied from 2 to 3 per week or per month. He would do oil changes, brake jobs, mufflers. He had a lift in his own garage. He used electric tools. Some jobs were for friends. Some were paid; some were not.

Petitioner testified that he was paid by check each week. He worked six days a week, eight hours per day with an unpaid 30-minute break. He worked 48 or 46 hours a week. Petitioner could not answer whether it was more likely than not that he would work overtime in a month. Sometimes he worked overtime and sometimes he did not. Petitioner would use a timecard to establish his hours worked (PX 9). Petitioner's testimony regarding his earnings varied. He initially testified that he was paid "maybe" $10.00 to $20.00 per hour. He then testified that in July 2012 he earned $11.00 per hour, but then testified that he earned $12.00 per hour. PX 1 contains wage and tax documents including a 2012 W-2 form with total earnings of $28,387.74 and withholding of taxes. PX 1 included copies of checks to Petitioner from Tech Auto with net payments from $460.14 to $490.14 per week. Petitioner and Tech Auto stipulated that the average weekly wage was calculated at $562.50 (Arb. Ex. 1).

Daniel Chen testified that he is the president of Tech Auto. Ray Chen, his brother, is an officer of the corporation. They have been in business since 1990. They have had between two to five employees. In July 2012, they had three employees. He testified that he did not have Workers' Compensation insurance on that date. He got insurance afterward and is now insured through Utica. The NCCI subpoena response found no proof of insurance for Tech Auto on July 20, 2012 (PX 8).

On July 20, 2012, a Friday, Petitioner worked from 8:00 a.m. to 6:00 p.m. He testified that on that morning, his left hand and thumb were fine. At 5:00 p.m., while using a torch, a piece of a muffler fell onto the base of his left thumb. The bone or tendon was visible, and it was bleeding. He felt severe pain and numbness. He did not continue to work after the injury. Petitioner testified no one was in the immediate area, but there were two other mechanics in the building, as well as Ray Chen, the company secretary. Ray Chen poured water on Petitioner's hand and tried to wrap it in a cloth. No one offered to take Petitioner to the hospital. He was told to go home. Petitioner drove himself home. Dan Chen testified his brother Ray Chen was present when the Petitioner came in with his injured hand.

The next day, Petitioner's hand became swollen and he went to the emergency room. On July 21, 2012, Petitioner first sought treatment at Gottlieb Memorial Hospital. He provided a history of taking a muffler off with a torch when the muffler came down and gave him a laceration to both his left hand as well as a small cut to

his forehead. He was diagnosed with a left-hand laceration with metallic foreign bodies and felt to require surgery. Due to high blood pressure, surgery was postponed (PX 2, PX 3).

On July 23, 2012, Petitioner was seen at Illinois Orthopaedic and Hand Center by Dr. Tom Karnezis (PX 6). The records note: "He works at Tech Auto. This happened Friday when he was torching a muffler underneath a car at his place of work. This muffler pipe somehow broke and fell onto thumb directly. It transected the tendon and multiple foreign bodies that appear to be rusted are in there. They were not able to remove all of them. He still has foreign body." Petitioner was diagnosed with a possible open fracture to the base of the first metatarsal. He was instructed to go back to the emergency room (PX 6). On July 23, 2012, Petitioner underwent surgery at Alexian Brothers Medical Center (PX 4). Petitioner was diagnosed with a left thumb open metacarpal fracture with local foreign body impregnation as well as nerve and tendon transections. Petitioner underwent: (1) an irrigation and debridement of the left thumb with removal of foreign bodies and wound closure; (2) a repair of the extensor pollicis brevis tendon with pinning of the metacarpophalangeal joint; and (3) a neuroplasty and repair of the dorsal sensory branch of the radial nerve with application of an extensor neural tube (PX 4).

On August 6, 2012, the pin was removed from Petitioner's thumb and x-rays were normal. On August 27, 2012, his wound was cleaned and debrided, and his sutures were removed. Petitioner was referred to physical therapy. It was noted that he believed his employer would be covering the costs (PX 6). Petitioner testified that he attempted to go to physical therapy, but was refused treatment when he informed the physical therapist, he did not have insurance. The records reflect that Petitioner attended physical therapy on September 6, 2012. Planned services were to be through December 6, 2012. There is a note that the facility contacted Wellcare to obtain authority for the September 6, 2012 evaluation. Petitioner attended therapy on September 6 and September 18, 2012 (PX 2). On September 10, 2012, Dr. Karnezis stopped physical therapy and noted that "He has no complaints of any problems. He is released." No work status note was recommended (PX 6). The records include a September 17, 2012 authorization for 12 therapy visits through November 6, 2012. The records reflect that on September 26, 2012, Petitioner's wife called the physical therapy provider and stated that her husband was not going to attend further physical therapy since he was no longer going to see the doctor (PX 2).

Petitioner testified to some subsequent complaints in his neck and shoulder. Petitioner was under the care of Dr. John Wilson and Dr. Leonard Dubin for unknown and unspecified conditions in December 2012 and 2013. He was given restrictions (PX 9).

Petitioner testified he returned to work for Tech Auto doing his regular job. He worked one hour less per day. While he was off work, he did work at his home garage even though he was on restrictions. He would do some work without the splint. George brought cars on his tow truck. George had worked briefly for Auto Tech. Petitioner testified he made only a little money doing work at home while he was off of work. Petitioner retired in 2015. He still does some work at his home garage. Petitioner testified he still has numbness and limited range of motion in his thumb.

Petitioner was examined by Dr. Ajay Balaram at Respondent's request on June 13, 2017 (RX 1, Dep. Ex. 2). Dr. Balaram testified by evidence deposition taken March 12, 2019 (RX 1). He testified that Petitioner reported having regained the majority of the use and function of his left hand and thumb. Petitioner's only complaint was numbness over the dorsal aspect of the thumb, occasional stiffness and not much pain. Petitioner denied any other pain in his left fingers, hand, wrist, elbow or shoulder. Petitioner reported that his strength had

returned to his left hand. Dr. Balaram's objective findings included diminished sensation over the dorsal aspect of the thumb with a slightly decreased range of motion. Subjective findings included numbness over the dorsal aspect of the left thumb with stiffness. Dr. Balaram diagnosed the Petitioner with a thumb laceration post repair of the extensor thumb tendon and radial superficial nerve with conduit. Dr. Balaram opined that there was no residual functional disability and that Petitioner has some slight diminished motion of the MP joint but compensates well with CMC and IP joint function. The dorsal sensory loss over the dorsal aspect of the thumb does not incur any functional loss. Petitioner was found to have no restrictions and was at MMI (RX 1).

Dr. Balaram testified that he did not perform either an impairment rating or a Utilization Review. He testified that Petitioner completed a Quick Dash form to report his perceived disability. The Quick Dash form was also entered as Deposition Exhibit 3. Dr. Balaram opined that the Petitioner had reached MMI in September of 2012 based upon Dr. Karnezis noting no complaints at that time. His earlier opinion that MMI would be in March 2013 was based upon the expected healing period of six months. Dr. Balaram confirmed that he could not determine if a bone fracture, a bone defect, or either occurred at the time of Petitioner's injury. He did not find any x-ray reports. He testified that Dr. Karnezis diagnosed a fracture in his records. Dr. Balaram testified that Petitioner's extensor pollicis brevis tendon was severed, which is one of three tendons in the thumb and is responsible for pulling the thumb backwards. Dr. Balaram testified that the injury did not affect grip strength. Dr. Balaram testified that the dorsal sensory branch of the radial nerve was also severed, which resulted in numbness and tingling in the dorsal of the thumb. Dr. Balaram opined that Petitioner obtained the best expected outcome of the nerve repair (RX 1).

Conclusions of Law

The Arbitrator heard the testimony of Petitioner and Mr. Chen in this matter and has reviewed the Exhibits submitted into evidence. In addressing the disputed issues in this matter, the Arbitrator finds that the Petitioner's testimony was unreliable. The Arbitrator notes that Petitioner often provided conflicting and contradictory testimony on various issues and provided testimony inconstant with his own medical records. The Arbitrator finds that the language barrier may have played a part of this issue and that the testimony of both witnesses suffered because of the long time lapse between the events and the hearing date.

In support of the Arbitrator's decision with respect to (A) Operating under the Act, the Arbitrator finds as follows:

The Illinois Workers' Compensation Act defines businesses that are considered "employers" and come under its jurisdiction. Under Section 3 of the Act, various types of businesses automatically come under its jurisdiction. The Arbitrator finds that on July 20, 2012, the Respondent-Employer was operating under and subject to the Act. Pursuant to Section 3, the Act automatically applies to a Respondent who meets any one of the seventeen listed "extra-hazardous" activities. Testimony at trial established that Respondent-Employer made use of equipment falling under Section (8), use of sharp-edged cutting tools or grinders, and Section (15), utilized electric, gasoline, or other power-driven equipment.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that Respondent-Employer was operating under and subject to the Act.

In support of the Arbitrator's decision with respect to (B) Employer/Employee, the Arbitrator finds as follows:

The existence of an employer-employee relationship between Petitioner and Respondent-Employer is a prerequisite to determining further compensability of the claim. The Arbitrator finds that the evidence presented shows that an employee-employer relationship existed on the date of injury. Illinois law provides no specific litmus test for determining whether an employer-employee relationship exists. Rather, such a relationship, if one exists, must be inferred from the conduct of the parties, the right to control work being the primary factor in determining an employment relationship. There are multiple factors to consider in assessing the nature of the relationship between the parties. *Ware v. Indus. Comm'n.*, 318 Ill. App. 3d 1117, 1122, (1st Dist. 2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. *Roberson v. Indus. Comm'n*, 225 Ill. 2d 159, 175 (2000). Other relevant factors include: (8) the label the parties place on their relationship; and (9) whether the parties' relationship was "long, continuous, and exclusive." *Ware,* 318 Ill. App. 3d at 1122, 1126. "The single most important factor determining whether a party is an employee or an independent contractor is the right to control the manner in which one's work is done ... an independent contractor is one who undertakes to produce a given result, without being controlled as to the method by which he attains the result." *Bryant v. Fox*, 162 Ill. App. 3d 46 (1st Dist. 1987). "No single factor is determinative, and the significance of these factors will change depending on the work involved." The determination rests on the totality of the circumstances. *Roberson*, 225 Ill. 2d at 175.

No testimony or evidence was introduced regarding the right to control the manner in which the work was performed but the parties agreed that Mr. Chen was the boss. Petitioner testified to his regular work schedule and completed daily timecards to document his hours. Petitioner was paid hourly. Respondent-Employer provided Petitioner with a W-2 and withheld taxes from Petitioner's pay. Dan Chen testified that he withheld four dollars per paycheck for a uniform fee. Respondent-Employer's general business was auto repair and involved Petitioner's work. It is clear that both Petitioner and Respondent-Employer labeled their relationship as employee-employer. Petitioner completed an application for employment 2006, before he was hired, and they stipulated there existed an employee-employer relationship (Arb. Ex 1). Petitioner had performed services for the Respondent-Employer for nearly six years. However, the relationship was not exclusive as Petitioner performed similar work at home while employed by Respondent-Employer.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that an employee-employer relationship existed between Respondent-Employer Tech Auto Services and Petitioner at the time of the alleged injury.

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

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury occurs "in the course of" employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some

incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury.

Petitioner's testimony, corroborated by Mr. Chen and the medical history, is that Petitioner suffered a laceration of the left wrist when the muffler he was cutting fell on his wrist. This occurred during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties. It originated from a risk connected with, or incidental to, the employment.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Tech Auto on July 20, 2012.

In support of the Arbitrator's decision with respect to (E) Notice, the Arbitrator finds as follows:

Petitioner testified that he went to the office immediately after the accident and reported to Ray Chen, an officer of the company and Daniel Chen's brother. Dan Chen testified that his brother Ray Chen was in the office when the Petitioner came in with his injured hand. Based upon this undisputed testimony, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that he provided notice to Respondent within the time limits stated in the Act.

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). The present case is supported by both medical testimony *and* the chain of events.

Petitioner testified that he had no prior injuries to the left wrist before July 20, 2012 and that on that morning his wrist was fine. Following the accident, he suffered bleeding, pain and tingling. He began an immediate course of medical care for injuries consistent with the mechanism of injury. Dr. Karnezis notes the treatment rendered was for a work-related injury that he suffered fixing mufflers. Dr. Balaram testified that the condition of ill-being in the left hand was causally connected to the accident sustained

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that his condition of ill-being in the left hand is causally connected to the accidental injuries sustained on July 20, 2012.

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

Petitioner and Tech Auto stipulated that Petitioner's average weekly wage was $562.50 (Arb. Ex. 1). Petitioner testified to multiple possible hourly rates including $10, $11, $12 and $20 per hour. He testified to working 6 days per week, 8 hours per day, or alternatively from 8:00 AM to 6:00 PM with a ½ hour lunch. He also testified he averaged 46-48 hours per week. Petitioner testified he also did work on the side, but did not establish any amount per week. He also did not establish that he was an employee of any entity while doing the work at home to be considered an employee to qualify as concurrent employment. The Arbitrator finds Petitioner's testimony as to his earning unreliable and lacking credibility. Petitioner offered his W-2 for 2012 and checks representing his net pay for the pay periods for the third and fourth week of June 2012 at $490.14 per week (PX 1). The Arbitrator finds that the wage evidence submitted does not establish any exact wage, but the amounts documented PX 1 are consistent with the rate stipulated by the employer Tech Auto, the party in the best position to establish the wages.

Based upon the record as a whole and the stipulation of the employer Tech Auto, the Arbitrator finds that Petitioner's average weekly wage is $562.50.

In support of the Arbitrator's decision with respect to (H) Petitioner's Age and (I) Marital Status, the Arbitrator finds as follows:

Petitioner's unrebutted testimony is that on July 20, 2012, he was 65 years old. This is supported by the birthdate of 3/13/1947 on the I-9 (PX 9) and in the medical records (PX 2). Petitioner's unrebutted testimony is that on July 20, 2012, he was married with no dependent children.

In support of the Arbitrator's decision with respect to (J) Medical, the Arbitrator finds as follows:

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers' Compensation Commission,* 409 Ill. App. 3d 258,267 (1st Dist., 2011). Based upon the Petitioner's testimony and the medical records admitted from Gottlieb Memorial Hospital, Alexian Brothers Medical Center and Dr. Kamezis, the Arbitrator finds that the treatment rendered to Petitioner for the injury to his left wrist was reasonable, necessary and causally connected to the accident.

Petitioner submitted the claimed bills as PX 7, PX 11A and PX 12. PX 7 is a statement from Dr. Kamezis dated 11/20/15 showing payments by Wellcare of $3,194.63 and a balance of $3,698.21. Respondent paid $3,998.21 on March 2, 2017 (PX 14) clearing the balance claimed on the 2/14/17 statement (PX 13). Based on the evidence, Dr. Kamezis is paid in full. PX 11A documents Alexian Brothers Medical Center bill was adjusted and after the Wellcare payment of $5,091.60 was paid in full. PX 12 notes that the Loyola Medicine

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(Gottlieb) bill shows a balance owed of $65.00 (RX 1). This was paid by Tech Auto to Petitioner on August 18, 2012 (RX 2), leaving this bill also paid in full. PX 9 includes documentation that Petitioner's insurance was paid at least in part by Respondent resulting in the Wellcare payments being a benefit for which credit is allowed pursuant to Section 8(j).

Based upon the record as a whole, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that there are any unpaid medical expenses due. 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.

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

Petitioner is alleging temporary compensation from July 21, 2012 through September 10, 2012, a period of 7 3/7 weeks. Based upon the Arbitrator's finding with respect to Average Weekly Wage, his TTD rate would be $375.00 per week and the claimed compensation totals $2,785.71.

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 Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To be entitled to TTD benefits a claimant must prove not only that he did not work but that he was unable to work. *Freeman United Coal Min. Co. v. Indus. Comm'n*, 318 Ill. App. 3d 170, 175, 741 N.E.2d 1144, 1148 (2000).

Petitioner's claimed period spans the time that he was under active medical care through his release by Dr. Karnezis. Dr. Karnezis records state that a no work status note was provided on August 6, 2012. No off work slips were included in the evidence. Further, Petitioner testified that while he was under care, he was performing auto repair work in his home garage. He testified that he did this work while he was in the splint and would remove it to do certain jobs. Based upon this testimony, the Arbitrator finds that Petitioner failed to prove entitlement to temporary compensation.

The Arbitrator further notes that, even if Petitioner was entitled to the full period of 7 3/7 weeks claimed, PX 1 documents payments by Respondent of $2,496.50 for sick time lost in July and August 2012 and a payment for the first week of September of $426.75 for a total of $2,923.25, Petitioner has been fully compensated for the alleged lost time having received payments in excess of the amount of TTD claimed.

Based upon the record as a whole, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he is entitled to any unpaid Temporary Total Compensation.

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

Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. However, the Arbitrator has considered Dr. Balaram's comments as a factor in the evaluation of Petitioner's permanent partial disability as required by §8.1b(b)(i). The doctor noted that Petitioner reported having regained the majority of the use and function of his left hand and thumb. Petitioner's only complaint was numbness over the dorsal aspect of the thumb, occasional stiffness and not much pain. Petitioner reported that his strength had returned to his left hand. Dr. Balaram's objective findings included diminished sensation over the dorsal aspect of the thumb with a slightly decreased range of motion. Subjective findings included numbness over the dorsal aspect of the left thumb with stiffness. Dr. Balaram diagnosed the Petitioner with a thumb laceration post repair of the extensor thumb tendon and radial superficial nerve with conduit. Dr. Balaram opined that there was no residual functional disability and that Petitioner has some slight diminished motion of the MP joint but compensates well with CMC and IP joint function. The dorsal sensory loss over the dorsal aspect of the thumb does not incur any functional loss. Petitioner was found to have no restrictions and was at MMI. 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 an auto mechanic at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that he worked until his retirement in 2015 for Tech Auto as well as at home. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 65 years old at the time of the accident. He would be considered an older worker. Petitioner retired within a few years of the injury. Because of this, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner's testimony that he worked an hour less after his return to work but there is no evidence that this was because of any work restrictions placed on him by his doctors. He did not testify to his earnings after the injury. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner has advanced complaints in the left hand of numbness and loss of motion which are documented by Dr. Balaram. Dr. Kamezis treated Petitioner only through September 2012, at which time Petitioner advanced no complaints. Petitioner has not sought any further treatment thereafter. The Arbitrator does not find Petitioner's testimony that he did not treat because of insurance issues credible in light of his subsequent treatment with Dr. Dolan and Dr. Wilson for unrelated conditions. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 15% loss of use of the Left Hand pursuant to §8(e)9 of the Act.

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In support of the Arbitrator's decision with respect to (M) Penalties, the Arbitrator finds as follows:

Petitioner filed a Petition for Penalties and Attorney's Fees on December 9, 2016 (PX 10) seeking medical and TTD benefits. The Arbitrator notes that the Petition does not detail the exact bills sought nor the period of claimed TTD and no attachments are referenced in the filing. No other evidence was offered to establish the demands for payment of benefits or detail of the benefits sought. Respondent filed a Response on March 14, 2017 claiming that all bills and lost time benefits had been paid. This response documented payments for medical and lost time as well as efforts to establish what may have been owed. Based upon the evidence submitted and pursuant to the Arbitrator's findings with respect to Medical and Temporary Compensation, the Arbitrator finds that Respondent's claim of payment for all outstanding charges was correct. Respondent, despite being uninsured was diligent in making payments for bills received and lost time. All benefits were paid. Petitioner presented no evidence to document any specific demand made for any claimed unpaid benefit after the generic filing of his Petition.

Based upon the record as a whole, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that there was any unreasonable delay in the payment of benefits claimed for medical or temporary compensation or, in fact, any unpaid benefits at all, and the claim for penalties and attorney's fees is denied.

In support of the Arbitrator's decision with respect to (O) Liability of the Illinois Workers Benefit Fund, the Arbitrator finds as follows:

The Illinois State Treasurer as ex officio custodian of the Injured Workers' Benefit Fund was named as a party respondent in this matter. Petitioner submitted sufficient credible evidence that Respondent-Employer Tech Auto was not insured at the time of the injury. The evidence consists of the National Council on Compensation Insurance Certificate (PX 8) and the admission of Mr. Chen.

This finding is hereby entered as to the IWBF to the extent permitted and allowed under §4(d) of the Act. Should any recovery by the Petitioner occur, Respondent-Employer shall reimburse the IWBF for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the IWBF, including but not limited to any full award in this matter, the amounts of any medical bills paid, temporary total disability paid or permanent partial disability paid. The Employer-Respondent's obligation to reimburse the IWBF, as set forth above, in no way limits or modifies its independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

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

EDGAR MARTIN,

Petitioner,

vs. Nos: 11 WC 21426

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY,

21IWCC0012

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 accident, collateral estoppel, medical expenses, temporary total disability, 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, with the changes made below.

In this case, Petitioner claims he suffered Acute Stress Disorder immediately after being shot during a lunch break [11 WC 21426], as well as Post-Traumatic Stress Disorder (PTSD) following a second incident where an unemployment applicant threatened to shoot people in his office [12 WC 36359]. The claims were consolidated for hearing before the Arbitrator. While affirming and adopting the Decision of the Arbitrator in decisions issued separately today, the Commission writes additionally on an evidentiary question and the issue of permanent partial disability benefits.

Regarding the evidentiary question, the Commission observes that Kevin Duffin, a retired commander of the Chicago Police Department (CPD), testified on behalf of Petitioner. Mr. Duffin stated that he had served in the CPD for almost 36 years. He also stated that he supervised the detectives that investigated a March 17, 2011 shooting that gave rise to the incident at issue in 11 WC 21426.

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Mr. Duffin testified that Respondent's 47th Street office was in the Kenwood neighborhood, located in the 2nd Police District. He stated that his review of crime statistics for 2011 indicated that the district had a lot of violent crime when compared to other neighborhoods. He opined that in 2011 this neighborhood, Englewood, and Garfield Park probably had the highest amount of random gun violence. Mr. Duffin further opined that assaults with guns were fairly common in the neighborhood. He explained that through 2011 and into 2012, this area had one of the bloodiest gang conflicts in recent history, involving the SuWu Gangster Disciples and the 4-6 Terror Town gang. On cross-examination, Mr. Duffin acknowledged that he was not personally involved in the investigation of the March 17, 2011 shooting that gave rise to Petitioner's claim.

At the outset of Mr. Duffin's testimony, Respondent's counsel objected to the submission into evidence of a police report related to the shooting. The Arbitrator sustained the objection in part and overruled the objection in part. Although Respondent did not renew the objection on review, the Commission observes that any error in the partial admission of the police report would have been deemed harmless, given that Mr. Duffin's expert testimony did not rely upon that report, but upon his professional experience and review of police statistics.

Regarding the issue of issue of permanent partial disability (PPD) benefits, the Arbitrator elected to award benefits in 12 WC 36359 rather than in 11 WC 21426 because Petitioner's psychologist, Dr. Kelly Dineen, testified that Petitioner's diagnosis changed from Acute Stress Disorder to PTSD after the second incident. The Arbitrator awarded permanent partial disability benefits representing a 10% loss of the person as a whole in 12 WC 36359.

Petitioner objects to the denial of PPD benefits in 11 WC 21426, arguing that some permanent disability persisted from the March 17, 2011 shooting. The argument is not persuasive. Where a claimant has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, unless there is some evidence presented at the consolidated hearing that would permit the Commission to delineate and apportion the nature and extent of the permanency attributable to each accident, it is proper for the Commission to consider all the evidence presented to determine the nature and extent of the claimant's permanent disability as of the date of the hearing. See *Village of Deerfield v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 131202WC, ¶¶ 45-50 (discussing *City of Chicago v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 258, 265 (2011) and *Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, 279-80 (2011)). In this case, while the first accident may be characterized as a "physical-mental" claim and the second accident may be characterized as a "mental-mental" claim, both ultimately involve acute and distinct episodes of psychological injury with ongoing symptoms. Petitioner presented no evidence at the consolidated hearing that would permit the Commission to delineate and apportion the nature and extent of the permanency attributable to each accident. Accordingly, the Arbitrator did not err in making a single PPD award in 12 WC 36359.

Lastly, the Decision of the Arbitrator stating that the PPD benefit rate is $472.56 per week is corrected to $472.59 per week.

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

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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 March 17, 2011.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay for Petitioner's reasonable and necessary services of $635.00 to the Comprehensive Center for Women's Medical Center, 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 $525.10 per week for the periods from March 24, 2011 through June 16, 2011, a period of 12 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 the Decision of the Arbitrator filed on December 10, 2019 is hereby affirmed and adopted with the changes stated herein.

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

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

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: JAN 11 2021
o: 1/7/21
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0012

MARTIN, EDGAR
Employee/Petitioner

Case# **11WC021426**

12WC036359

IL DEPT OF EMPLOYMENT SECURITY
Employer/Respondent

On 12/9/2019, 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 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:

0786 BRUSTIN & LUNDBLAD
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SPRINGFIELD, IL 62794-9208

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

DEC - 9 2019

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

21IWCC0012

- ☐ 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

Edgar Martin
Employee/Petitioner

v.

Ill. Dept. of Employment Security
Employer/Respondent

Case # **11** WC **11262**

Consolidated cases: **12 WC 36359**

(A third case, numbered 14 WC 11262, was voluntarily dismissed on October 18, 2019)

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **October 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?
☒ What were Petitioner's earnings?
G. ☐ What was Petitioner's age at the time of the accident?
H. ☐ What was Petitioner's marital status at the time of the accident?
I. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **March 17, 2011 and September 18, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In each case, Petitioner's average weekly wage was $**787.65.**

On the date of accident, Petitioner was **49 and 50** years of age, ***married*** with **0** dependent children.

Petitioner ***has in part*** received reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services. RX 1.

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

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

MEDICAL BENEFITS

In 11 WC 21426, the Arbitrator awards Petitioner reasonable and necessary medical expenses of $635.00 from the Comprehensive Center for Women's Medicine (PX 4), subject to the fee schedule. The Arbitrator declines to award any of the other claimed medical and prescription expenses, for the reasons set forth in the attached decision.

TEMPORARY TOTAL DISABILITY

In 11 WC 21426, Respondent shall pay Petitioner temporary total disability benefits of $525.10/week, commencing March 24, 2011 through June 16, 2011, as provided in Section 8(b) of the Act.

In 12 WC 36359, Respondent shall pay Petitioner temporary total disability benefits of $525.10/week, commencing September 19, 2012 through November 19, 2012, a period of 8 6/7 weeks, as provided in Section 8(b) of the Act.

PERMANENT PARTIAL DISABILITY

For the reasons set forth in the attached decision, the Arbitrator elects to award permanency in 12 WC 36359. Respondent shall pay Petitioner permanent partial disability benefits of $472.56/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.

The Arbitrator awards no permanency benefits in 11 WC 21426.

PENALTIES/FEES

The Arbitrator declines to find Respondent liable for penalties or fees.

A third filing, numbered 14 WC 11262, was voluntarily dismissed as of the hearing.

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

Molly C Mason

Signature of Arbitrator

Date 12/9/19

Edgar Martin v. Illinois Department of Employment Security
11 WC 21426 and 12 WC 36359 (consolidated)

21IWCC0012

Summary of Disputed Issues

Petitioner, an unemployment claims processor based at an office on East 47th in Chicago, testified he and a co-worker were shot at on March 17, 2011 [11 WC 21426], while they were outside the entrance to their building, returning from an afternoon break. Petitioner heard someone yell "hey, unemployment!", felt something fly by his face and witnessed his co-worker get shot in the leg. Petitioner testified he and his fellow employees were required to take their breaks outside in what he perceived as a very dangerous neighborhood. After the incident, Petitioner was transported to Northwestern's Emergency Room, where he was diagnosed with a superficial gunshot wound. A physician removed a bullet from the right posterior scalp. Petitioner was discharged that day with directions to seek follow-up care. On March 21, 2011, Petitioner complained to Dr. Skul of some hesitancy about returning to work in the same neighborhood. On March 24, 2011, a physician's assistant took Petitioner off work and recommended he see Kelly Dineen, Ph.D., a clinical psychologist. Petitioner then underwent a brief course of care with Dr. Dineen. She initially diagnosed "acute stress disorder." On March 29, 2011, she issued a report indicating she anticipated that Petitioner would fully recover within a couple of weeks. On May 15, 2011, she found Petitioner's psychological symptoms to be "in remission."

Petitioner testified he subsequently sought, and was afforded, a transfer to a different Respondent unemployment claims office on West Diversey Avenue. He began working in this office on June 16, 2011. He testified he experienced a resurgence of psychological symptoms on September 18, 2012 [12 WC 36359], when an "irate" male client entered the office, got in the line of a co-worker and began threatening to shoot people. Petitioner testified he alerted his supervisor to the situation and asked to be allowed to work in another area but was rebuffed. He left work and did not return. Petitioner acknowledged knowing, before that incident, that the office was scheduled to close in approximately a week. Following the incident, Petitioner sought unemployment benefits but his claim was denied, following a hearing, due to "job abandonment." He underwent additional care with Dr. Dineen until December 2012. Dr. Dineen initially recommended he work in an environment with no client contact but, at her 2014 deposition, conceded she "probably" would not have continued to make this recommendation as of November 2012. Petitioner testified he conducted a job search, focusing solely on positions with Respondent, until mid-July 2014, at which point he began working as a caseworker in Respondent's Department of Health and Human Services. He was still performing this job at the time of the hearing.

The disputed issues in 11 WC 21426 include accident, causal connection, earnings, medical expenses, temporary total disability from March 21, 2011 through June 17, 2011 and September 18, 2012 through June 16, 2014, nature and extent and penalties/fees. Arb Exh 1. The disputed issues in 12 WC 36359 include accident, notice, causal connection, earnings, medical expenses, temporary total disability from September 18, 2012 through June 16, 2014, nature and extent and penalties/fees. Arb Exh 2.

Procedural Note

At the beginning of the hearing, Petitioner voluntarily dismissed a third claim numbered 14 WC 11262. Respondent raised no objection to the dismissal. T. 4.

Petitioner testified he was born on January 22, 1962. He grew up in Joliet. T. 16. He graduated from high school and attended various colleges. He ended up at Northern Illinois University. T. 16. He studied engineering but has always been passionate about the arts. T. 16. He attended Columbia College after he got married and took film-related courses there. He served in the United States Army and received a badge for marksmanship. PX 27. T. 18-19.

Petitioner acknowledged taking medication for depression when he was in his late 20s. He testified he was "functional" after he discontinued the medication. T. 19.

Petitioner testified he worked in building maintenance, as a doorman and for the Chicago Housing Authority before he started working for Respondent in 2009. After being hired by Respondent, he worked at an office located at 714 East 47th. He processed unemployment claims, denying some and approving others. He also helped people who were looking for work. He testified he enjoyed working with members of the community. T. 21-22.

Petitioner testified he earned about $45,000 per year as of March 2011. T. 24-25. He offered into evidence a copy of a paycheck for the period ending December 15, 2011. This document reflects gross earnings of $40,769.69 for the year to date and a "base amount" of $1,953.24. PX 24. He also offered into evidence a 2012 W2 form indicating Social Security wages of $32,300.76. PX 23. Respondent offered into evidence a CMS wage statement showing a yearly salary of $40,958.01 for the period March 2010 through March 2011. RX 2.

Petitioner described the neighborhood where he worked was very dangerous as of his hiring in 2009. T. 22. He observed people fighting on the street and saw activity going on at the corners. There were "gangbangers" in the area. Some of these individuals were his clients. He sometimes heard gunshots while he was at work. Four or five people were shot and killed in that area. T. 22-24.

Petitioner testified he and a co-worker, Ed White, took a break at about 3 PM on March 17, 2011. T. 29. Petitioner testified he and his fellow employees were required to leave the building to take their breaks. T. 25-26. Their supervisor, Cynthia Hurst, required them to go outside. Petitioner testified that, as he and White were returning from their break, he heard the sound of firecrackers and felt something "whistle" by his face. He and White realized they were being shot at. A bullet went into the back of Petitioner's head, near his right ear. At that point, he and White were about three feet away from the door they were required to use when taking breaks. Petitioner testified he heard someone yell: "hey, unemployment!" He does not know who yelled this. He saw a woman and a man and "had a bad feeling about them." T. 28. He went into "flight mode" and rushed through the door, re-entering the building where he worked. T. 28. The door was on the left side of the building. The wall on that side was yellow. T. 30.

Petitioner testified he saw a co-worker, Cecelia Crenshaw, after he went through the door. He asked her if there was "something back there," indicating the back of his head. She told him he had been shot. The wound started bleeding. T. 30-31. He saw blood on his shirt. He was brought to an office. A male co-worker cried at the sight of him and had to be consoled. Police officers arrived, carrying Ed White, and laid White down in front of Petitioner. White was not able to sit up. T. 32.

Petitioner testified he initially did not want to go to the hospital. Nothing felt real at that point. T. 33. After an ambulance arrived, he was transported to the Emergency Room at Northwestern. A history reflects that Petitioner "was shot by unknown assailants while entering work from break." A head CT scan demonstrated that the bullet was in an area of subcutaneous tissue and "did not penetrate the scalp". A doctor made a 2-centimeter incision, removed the bullet, and sutured the wound. Petitioner was given a tetanus shot and antibiotics. At discharge, Petitioner was instructed to follow up with his primary care provider in one week for suture removal. PX 1, 3.

Petitioner described himself as "in denial mode" after the accident. He had a difficult time processing what had happened. T. 34. He "knew he couldn't return to" the same office. He applied for an FMLA leave. This leave expired May 17, 2011. T. 35. That was a "very difficult period" for him because he "had to fill out a lot of forms." T. 35. He testified he received no benefits while on leave but RX 2 reflects he received a payment of $802.76 for the period March 18, 2011 through March 24, 2011 and accumulated sick pay totaling $802.76 for the period March 25, 2011 through March 31, 2011. He also requested an accommodation in the form of a transfer to a different work location. T. 37. The request was eventually granted. [See further below].

On March 21, 2011, Petitioner saw Dr. Skul, an internist affiliated with the Comprehensive Center for Women's Medicine. The doctor noted that, around 3:20 PM on March 17, 2011, Petitioner and a co-worker were returning to their office, following a break, and were about 6 feet away from the entrance when they heard five shots. The doctor indicated that the co-worker was shot in the leg and that a bullet "lodged" in Petitioner's skull and was later removed. She indicated that Petitioner experienced head pain for about 36 hours after being shot and was no longer experiencing any physical symptoms. She described Petitioner as having "some feelings of hesitancy with regards to taking public transportation or returning to work." She directed Petitioner to return in three days for removal of the sutures and "keep track of physical symptoms and emotional state." PX 3.

Petitioner returned to the Comprehensive Center for Women's Medicine on March 24, 2011 and saw a nurse practitioner. Petitioner denied any physical symptoms but reported some difficulty falling and staying asleep. The doctor noted that Petitioner "realizes he will need to get back to work and does not want his future work capability limited, but simply does not want to get back into that neighborhood." She noted that Petitioner brought forms "to apply for relocation of his primary work assignment." She removed the sutures, noting a small scab. She described Petitioner's behavior, affect and speech as "appropriate to situation." She recommended that Petitioner see Kelly Dineen, PhD, a clinical psychologist [hereafter "Dr. Dineen"], and stay off work "until psych eval and completion of forms for work location transfer." PX 3.

Petitioner first saw Dr. Dineen on March 29, 2011. Dr. Dineen noted a referral from Dr. Hoyer. [No records of Dr. Hoyer from this time period are in evidence.] She recorded the following history:

> "[Petitioner] stated that, on March 17th, he and a co-worker were returning from getting food from a nearby grocery store when he heard shots and felt 'something going across my face'. He saw his co-worker shot in the leg, felt dazed, like everything was in 'slow motion' and then felt 'a lot' of blood running down his face."

Dr. Dineen noted that Petitioner remembered the Emergency Room physician telling him he was "just inches away from being seriously injured or dead." She noted that, since the incident, Petitioner had

felt anxious, restless and unable to concentrate. She also noted that Petitioner was finding it difficult to fall and stay asleep as he was worried about work and "ruminating about what happened." She indicated that Petitioner had been experiencing nightmares and flashbacks of the shooting. She also noted he felt irritable and was "staying home and avoiding going outside."

Dr. Dineen described Petitioner as experiencing a "near traumatic, near death experience" and witnessing the shooting of a co-worker. She found his symptoms consistent with "acute stress disorder" due to the time frame and nature of the symptoms. She recommended a sleep plan, daily yoga and painting for relaxation. She indicated she would continue to assess Petitioner "for progression to PTSD." PX 2.

On March 29, 2011, Dr. Dineen issued a letter addressed "to whom it may concern." She described the shooting and the results of her evaluation of Petitioner. She described Petitioner as a "highly functioning individual with no history of depression or anxiety." She described his current symptoms as a "normal response to a highly traumatic situation." She opined that Petitioner "will return to normal functioning" within "a couple weeks." She indicated it was essential that his request not to return to work at his prior location be honored. PX 2

On March 29, 2011, Dr. Skul completed an "initial workers' compensation medical report" describing the shooting. She estimated that Petitioner would be able to return to work, without restrictions but at a "different work location," as of May 18, 2011. She described Petitioner's prognosis as excellent. PX 7. In a separate CMS physician's statement form, dated April 5, 2011, Dr. Skul noted that Petitioner was supposed to return to her in a couple of weeks, after a psychological evaluation, "for return to work determination." She opined that Petitioner's ability to return to "full work capacity" at a different location was excellent. PX 7.

Petitioner returned to the Comprehensive Center for Women's Medicine on April 5, 2011 and again saw a nurse practitioner. Petitioner reported having seen Dr. Dineen and employing strategies she recommended. He also reported having used Xanax a few times to help with sleep. He indicated he would "see the entrance door to work" in his dreams. He expressed anger and frustration associated with having to complete forms "to get the needed work location transfer in motion." He presented these forms for completion. The nurse practitioner completed the forms. She directed Petitioner to continue taking Xanax at bedtime as needed, along with NuSera during the day to help with anxiety. PX 3.

Petitioner offered into evidence an Employee's Notice of Injury. It appears Petitioner completed and signed this form on April 6, 2011. He indicated he and Ed White, were shot at five times by an "unknown assailant" on the afternoon of March 17, 2011, as they were "returning from break to workplace." Petitioner identified the "place where injury occurred" as "at sideway entrance of 715 W. 47th Street." He indicated a bullet was lodged in the rear right section of his head. PX 8.

Petitioner returned to Dr. Dineen on April 15, 2011 and complained of disturbed sleep. Petitioner indicated he was taking the Ativan that Dr. Hoyer prescribed but did not want to use this on a long-term basis. He also indicated he was doing yoga daily and was painting and writing, "trying to put his experience into words." He indicated he was still experiencing hyper-arousal and was "worried about returning to his workplace" because he felt unsafe. He told Dr. Dineen he wanted to pursue changing work locations. PX 2.

Petitioner saw Dr. Dineen again on April 29, 2011. Dr. Dineen described Petitioner's symptoms as "greatly improving" but indicated Petitioner was still wary around people. She also indicated that Petitioner "states that he is ready to get back to work and is going to different offices to be sure he feels comfortable in the neighborhood."

On May 15, 2011, Petitioner returned to Dr. Dineen and reported feeling "very annoyed" due to the lack of progress with his request to change work locations. Petitioner indicated he felt "at loose ends" not working and was experiencing financial concerns. Dr. Dineen described Petitioner's sleep as "much better" and indicated his symptoms were "in remission." She recommended Petitioner continue with his self-care plan. PX 2.

The Arbitrator sustained Respondent's hearsay objection to PX 18, a letter dated June 8, 2011 sent to Petitioner by the Illinois Department of Employment Security.

Petitioner testified he started working at a Respondent unemployment claims office at 1740 West Diversey on June 16, 2011. He denied working anywhere between the shooting and this date. He performed his regular caseworker duties at the new location. Petitioner testified he noticed a few things that bewildered him after he began working at the Diversey location. He was much more guarded when he interacted with clients. T. 38. If a desperate client came near his desk, it caused him anxiety. He denied experiencing this kind of anxiety before the March 17, 2011 shooting. T. 39.

On June 30, 2011, Petitioner returned to the Comprehensive Center for Women's Medicine and saw Dr. Hoyer. The doctor noted he was being seen for a skin eruption over the mid sternum. She described him as "sleeping better after gunshot wound." PX 3.

On February 10, 2012, Petitioner saw Dr. Hoyer again, in follow-up from an Emergency Room visit for strep throat. The doctor's treatment plan included the following: "talk to Dr. Dineen again as some of the anxiety surrounding the gunshot wound is resurfacing." PX 3.

Petitioner saw Dr. Hoyer again on August 23, 2012, for an annual examination. The doctor noted he was "suffering from lots of symptoms after the shooting he experienced last March 2011." She indicated that the symptoms had worsened in the spring of 2012 and "coincided with wife's wish to move apartments." She also referenced "an episode at work" during which Petitioner "had more anxiety after seeing similar folks at work that reminded him of the people he was shot by." She indicated he reported being called "unemployment" before he and his co-worker were shot at. She described him as feeling anxious that "disgruntled clients will again try to hurt him or his co-workers if they become agitated." She noted he had not informed his current supervisors or co-workers about the shooting incident. She described him as "very fearful of work environment and a particular dark tunnel en route to and from work." She also noted he was in marital counseling and "very stressed" about it. She indicated he felt he might have a tremor. On examination, she noted a faint tremor in the upper extremities. She felt this was likely due to caffeine intake. She prescribed lab work. She recommended that Petitioner wean off caffeine and follow up with Dr. Dineen. PX 3.

Dr. Dineen's treatment notes reflect she spoke with Petitioner by phone on September 1, 2012, with Petitioner reporting that an "incident at work triggered a lot of emotions in him." Petitioner indicated that a "crazy" client had come into the office, talking about shooting people. Petitioner told Dr. Dineen he reported the incident to his supervisor, who did not call the police. Petitioner indicated the supervisor told him to go back to his desk. Petitioner reported feeling "very afraid and anxious" and

leaving the office. Petitioner indicated he had gone to human resources and reported what happened. He described himself as "very, very anxious" and unable to sleep. Dr. Dineen scheduled an appointment for him to come in on "Friday." PX 2.

Petitioner saw Dr. Dineen on September 7, 2012 and reported experiencing flashbacks of a "shadowy figure running toward [him], a brick wall and blood dripping." Petitioner reported feeling very easily aroused and responsive to loud noises and sudden movements. He also reported being easily "triggered" by "gangbangers" he saw on the street or at work. He described himself as withdrawn, angry and "drinking too much in an effort to calm himself down." Dr. Dineen directed Petitioner to stop drinking and resume his self-care plan, "starting with sleep hygiene." PX 2.

Petitioner returned to Dr. Dineen on September 14, 2012 and reported erratic sleep patterns, a "high startle response" and hyperarousal. Petitioner reported that he was "moving out of a sense of denial" and processing that he "could have died" in the March 2011 incident. Petitioner also reported feeling "a lot more angry about what happened," with this having an impact on his marriage. Dr. Dineen noted that Petitioner's post-traumatic stress disorder symptoms were re-emerging and that this was actually "helpful and healing." She again recommended a self-care plan. PX 2.

Petitioner testified he was working in the front section of Respondent's Diversey office on September 18, 2012. He was near the door, where people came in off the street to process claims. T. 39. Yolanda Rodriguez, a co-worker, was working next to him. A doorway was in front of him. A man came through the door and got into the line of people waiting to see Rodriguez. Both he (Petitioner) and Rodriguez were about three feet away from this man. T. 40. The man was "irate" about his claim. He started threatening to shoot people if he did not get a favorable result. Petitioner acknowledged he did not see any weapon. T. 41. Petitioner testified he went to Floyd States, his immediate supervisor, and told States there was someone up front threatening people and he did not want to work up there. He asked States if he could work at his other desk, which was farther back. T. 42. States insisted that Petitioner resume working at the booth that was up front. Petitioner responded, "if you push me, I'll leave," to which States replied "bye." Petitioner then left the office. Petitioner testified he was experiencing a sensation of the "need for flight" that was similar to the sensation he had experienced after he heard gunshots on March 17, 2011. T. 43. It was a "surreal" moment for him because, under ordinary circumstances, he would not leave a job. T. 42-44.

Petitioner testified he never returned to work at the Diversey office. The entire office was laid off. He applied for unemployment benefits. His claim was denied. T. 46.

Petitioner testified he called Dr. Dineen right after he left work, following the September 18, 2012 incident. He told Dr. Dineen he needed to see her again, explaining he had just left a job because "someone threatened to shoot." T. 44.

On September 18, 2012, Dr. Dineen issued a letter addressed "to whom it may concern" indicating that she worked with Petitioner after the March 2011 shooting and that Petitioner's symptoms were "reactivated following a distressing incident at work [September 18, 2012] whereby he felt threatened by a client who exhibited aggressive behavior toward him and a co-worker." She addressed Petitioner's work capacity as follows: "It is my professional opinion that [Petitioner] can return to work in an administrative capacity provided he does not have direct client contact." PX 3.

Petitioner testified that, after being laid off on September 29, 2012, he could function but with difficulty. T. 48. He felt angry, pessimistic and frustrated. T. 47. The feelings he experienced were different from the kind of depression he had experienced in his 20s. T. 47. He started looking for another job. He felt "zombiefied" and was not aware he was "in the midst of a disorder." His marriage "took a hit." T. 49.

Petitioner acknowledged he limited his job search to positions with the State of Illinois, even though "this made a lot of people mad." He came to the State of Illinois building in 2012 and 2013 and took employment-related tests through CMS. T. 50.

On October 17, 2012, Petitioner's counsel wrote to David Van de Burgt, who was then affiliated with the Illinois Attorney General's office. Petitioner's counsel sent Van de Burgt Dr. Dineen's report of October 10, 2012 and demanded that Respondent begin paying temporary total disability. PX 26.

On October 19, 2012, Petitioner filed an Application for Adjustment of Claim in 12 WC 36359 alleging he "received threats while on the job" on September 18, 2012 and aggravated a mental condition. Arb Exh 3.

Petitioner returned to Dr. Hoyer on October 27, 2012 and reported having returned to Dr. Dineen. Dr. Hoyer recorded the following history:

> "Laid off of work on 10/2/12. Prior to that time, there was a client at work who spoke about 'shooting' in the office. Protocol was not followed (police not called) and pt left the premises after he was told to 'go back to the front' to deal with the clients. After he left (in fear – as he was the victim of a shooting near work in March 2011. He was laid off afterwards."

Dr. Hoyer recommended that he continue counseling for post-traumatic stress disorder. PX 3.

On November 9, 2012, the Illinois Department of Employment Security issued a written determination denying Petitioner's claim for unemployment insurance benefits:

> "Did the claimant voluntarily leave employment? The evidence shows that 'the claimant left his place of employment on September 18, 2012 without authorization. The claimant was a "no call no show" from September 18, 2012 through September 26, 2012. The claimant is denied on voluntary leave because he left his employment, he did not call in to report his absences and he abandoned his job."

PX 19.

Petitioner saw Dr. Dineen again on November 29 and December 14, 2012. On November 29th, Dr. Dineen noted that Petitioner had returned to the scene of the shooting and had "found that the wall he was seeing in his flashbacks was real." She indicated that Petitioner was looking for work four days a week. She noted that Petitioner's marriage still remained "a huge source of anxiety," along with his personal finances.

On December 14, 2012, Dr. Dineen noted that Petitioner reported having a disturbing dream in which he felt "stuck" and unable to escape. She indicated he "recognized the parallels to the shooting and the way he is feeling in his life at this point." She also discussed Petitioner's job search. She described Petitioner as continuing to improve. PX 2.

Petitioner returned to Dr. Hoyer on August 27, 2013. The doctor noted that Petitioner had been off work since September 18, 2012, "when a client in the office threatened to shoot and the patient refused to sit at the front desk." She indicated that "the entire office was laid off" a week later. She noted that Petitioner "has PTSD issues and has seen Dr. Dineen re anxiety." She indicated bankruptcy proceedings would be held the next day. She noted that Petitioner and his wife had gone through counseling and were no longer separated. She indicated that Petitioner's "alcohol intake increases with stress to 1 bottle of wine per day." Her diagnoses included "anxiety state, unspecified." PX 3.

Dr. Dineen testified by way of evidence deposition on March 14, 2014. PX 6. Dr. Dineen testified she obtained a Ph.D. in clinical psychology from Northwestern in 1998. PX 6, pp. 4-5. She has been in private practice for 12 years. She sub-specializes in health psychology and sees a lot of people with chronic pain or illness. PX 6, p. 5. She sees probably 5 patients per year who are suffering from post-traumatic stress disorder. At one point, when she was assessing victims of torture, she saw 15 to 20 post-traumatic stress disorder patients per year. PX 6, p. 6. The "cardinal feature" of the disorder is "either you have a personal experience or witness an experience that is a near-death experience." Within the first three weeks of a trauma, people typically have difficulty sleeping, nightmares and anxiety. At this point they have "acute distress disorder." A certain percentage go on to develop post-traumatic stress disorder. Some people have the disorder for life. PX 6, p. 7. It can become dormant and then be triggered by another trauma. PX 6, p. 8.

Dr. Dineen testified she first saw Petitioner on March 29, 2011. She independently recalls Petitioner. He consulted her following a shooting incident. PX 6, p. 8. He was "sort of emotionally numb" and had a startle response. She did not diagnose him with post-traumatic stress disorder at that point because the trauma had just happened. She diagnosed him with acute distress disorder. She next saw Petitioner on April 15, 2011. Petitioner's sleep was still disturbed and he was still experiencing intrusive memories and hyperarousal. By the next visit, on April 29, 2011, Petitioner was calmer and sleeping better. He denied nightmares and flashbacks but still felt uncomfortable around people. PX 6, pp. 10-11.

Dr. Dineen testified she did not hold Petitioner off work during any of his visits through April 29, 2011. By May 15, 2011, Petitioner was saying his previous symptoms were no longer bothering him. His main complaint was not being able to return to work. His anxiety "was not focused around the shooting incident." It was "more about not returning to work and financial issues." PX 6, p. 11. She assessed Petitioner as being in remission from acute stress disorder. PX 6, pp. 11-12.

Dr. Dineen testified she next had contact with Petitioner on September 1, 2012. Petitioner called her that day, requesting an emergency appointment, because of an incident occurring at work. She saw him on September 7th. He told her a crazy client had come into the office talking about shooting people and threatening a co-worker. He went to his supervisor, who did not call the police. He was told to go back to his office. He felt panicky and "left the office." He then went to human resources and explained what had happened. PX 6, p. 12. Dr. Dineen indicated she did not feel Petitioner was capable of staying at work on September 1st. On September 7th, Petitioner related that he was "having

flashbacks of a shadowy figure running towards him and a brick wall with blood dripping." He was responsive to bright lights and sudden movement. He was easily triggered by what he called "gangbangers" on the street. On September 18, 2012, she issued a letter recommending that Petitioner return to work in an administrative capacity with no direct client contact. PX 6, p. 16. In October 2012, she assessed Petitioner as having post-traumatic stress disorder. PX 6, p. 16. In September 2012, Petitioner was "doing a lot of processing of the original trauma." The fact that he could have died and his flashbacks were much more prevalent than they were in the past. PX 6, p. 18. She did not hold Petitioner off work on September 18, 2012. PX 6, p. 18. The focus of a September 25, 2012 session was that he found out he was going to be laid off as of October 1st. Petitioner was "incredibly anxious about that." He also found that the person who was threatening at work was a paroled felon. Her assessment of Petitioner did not change at this time. PX 6, pp. 19-20.

Dr. Dineen testified she more fully assessed Petitioner on October 10, 2012. Petitioner completed the Hopkins symptoms checklist and the Harvard trauma questionnaire. All of the trauma centers use these tests. After Petitioner completed the tests, she assessed him as having post-traumatic stress disorder and major depression, single episode, mild to moderate level. It is very common for people who have experienced trauma to have both post-traumatic stress disorder and depression. PX 6, p. 22. The cause of the post-traumatic stress disorder, for Petitioner, was being shot. PX 6, p. 23. She discussed the use of medication with Petitioner but he did not want to try this. As of October 26, 2012, Petitioner was suffering a lot of marital and financial stress which "kind of exacerbated everything." PX 6, p. 25. As of the next visit, on November 20, 2012, Petitioner was improving and "he felt his PTSD symptoms were diminishing." Petitioner had been laid off as of October 1, 2012. As of November 20, 2012, she would probably not have restricted Petitioner to having no contact with clients. PX 6, p. 26. As of the next visit, on November 29, 2012, Petitioner was continuing to improve and "his anxiety was again focused more on personal finances and marriage issues." PX 6, p. 26. Petitioner was capable of working at that point and was actively looking for work. She last saw Petitioner on December 14, 2012. On that date, he was still improving and they mainly discussed his job search. PX 6, p. 27.

Dr. Dineen opined that, due to the shooting incident of March 17, 2011, Petitioner developed symptoms of acute stress disorder which, over time, emerged into post-traumatic stress disorder. PX 6, p. 28. She further opined that the event of September 1, 2012 "re-triggered" Petitioner's post-traumatic stress disorder. PX 6, p. 28. The initial shooting incident made Petitioner more susceptible to recurrence. The confrontation with a client on September 1, 2012 caused a recurrence of symptoms. In her opinion, it "would not be optimal" for Petitioner to return to work in a high crime neighborhood. If he encountered gang violence or heard shots, that could possibly trigger another episode. PX 6, p. 30.

Dr. Dineen testified her hourly rate of $130 is less than the typical Chicago area charge of $150 to $250. PX 6, pp. 30-31. The treatment she provided to Petitioner was related to the shooting incident and was reasonable. PX 6, p. 31.

With respect to Petitioner's prognosis, Dr. Dineen testified she thinks Petitioner "will be completely fine" if he has work that is in a safe environment. Petitioner is "a smart, creative person" who is "motivated to get work." PX 6, p. 31.

Under cross-examination, Dr. Dineen testified that, as a psychologist, she cannot prescribe medicine. PX 6, p. 32. With respect to the shooting incident, Petitioner told her he heard shots, felt something go by his face, saw a co-worker get shot in the leg, felt dazed and then felt blood running down his face. He felt unusually calm. This is "not an unusual response." PX 6, p. 33. She does not

know where the shooter was. Petitioner did not tell her he saw anyone with a gun. With respect to the September 2012 incident, her understanding is that Petitioner was sitting in an office and his co-worker was close to a "crazy" client. Petitioner left work after that incident. PX 6, p. 35. After Petitioner's four visits in 2011, she felt he could return to work. PX 6, p. 36. In 2012, Petitioner's symptoms were "more severe" than in 2011, as indicated by flashbacks, etc. It was at that point that she changed her diagnosis. PX 6, pp. 38-39. The 2012 incident was triggering because it made Petitioner feel very unsafe. It brought up repressed memories. PX 6, p. 40. She has not seen Petitioner since December 14, 2012. She never took Petitioner off work. PX 6, p. 42. She was Petitioner's therapist. She "wasn't taking him off or on work." Petitioner was negotiating with work on his own and occasionally asked her to write a letter. PX 6, p. 43. Petitioner's financial and marital difficulties certainly played a role in his anxiety. PX 6, p. 43. The post-traumatic stress disorder she diagnosed in 2012 lasted from September to December 2012. PX 6, p. 45.

On redirect, Dr. Dineen testified that a flashback can last just moments. It can be a sign of recovery because the person is bringing back memories that can then be discussed. PX 6, p. 46.

On March 13, 2018, Petitioner saw a nurse practitioner at Northwestern for what he described as "chronic PTSD" stemming from the 2011 shooting. Petitioner also reported depressive symptoms, indicating he underwent treatment for depression for two years when he was in his late 20s. The nurse practitioner described Petitioner as having a "biological predisposition to anxiety and depression." She started Petitioner on Lexapro. Petitioner returned to the same nurse practitioner on May 7, 2018 and reported feeling much better. The records reflect Petitioner discontinued the Lexapro due to side effects but was deriving benefit from the substituted medication, Wellbutrin. Petitioner denied having PTSD-related nightmares and indicated he felt he did not need to resume individual counseling. The nurse practitioner recommended he continue the Wellbutrin and return in one month. A subsequent note, dated August 22, 2018, reflects Petitioner obtained a refill of the Wellbutrin. PX 14.

Petitioner testified he eventually found a job with the State's Department of Health and Human Services. T. 50-51. He started this job on July 16, 2014 and is still there. This is the first job he was offered during his search for employment. T. 51. He is a caseworker who handles problems involving nursing home patients. He deals with paper, not the public. He enjoyed working with real people in the past but he finds his current job safer. The job was also closer to his home so he does not have to travel through unsafe neighborhoods. He feels stifled due to the need to avoid public interaction. He realizes that violence and shootings "can happen anywhere." When he feels stressed at work, he goes to a room where he stretches and performs breathing exercises. He sometimes does this two or three times in one day. He learned the exercises from Dr. Dineen and via yoga. T. 51-54.

Petitioner testified he has not engaged in painting or writing since the shooting because those activities require focus and his thoughts distract him. He finds it difficult to "see something through." T. 55-56.

Petitioner testified he and his wife saw Anthony Campobasso, a social worker, because his symptoms took a toll on his marriage. He and his wife saw Campobasso between November 2017 and January 2018. [The Arbitrator sustained Respondent's relevancy objection to Dr. Campobasso's records. With the exception of a brief allusion to a "shooting event" on the last page, these these records contain no mention of either accident.] Then Campobasso offered to have him see Tony Pacione, LCSW, who is also a social worker. [Records in PX 9 reflect Petitioner saw Pacione between January 9, 2018 and March 12, 2018. In his initial note, Pacione indicated that Petitioner had been referred by "Anthony C"

for individual therapy "for history post-traumatic stress disorder (client was shot in the head by assailant) and ETOH use disorder." Pacione also noted that Petitioner "reports history of depression pre-dated trauma event."] Petitioner testified he started taking Bupropion, a generic form of Welbutrin, an anti-depressant. He testified he continues to experience anxiety but the medication helps him process it. T. 59. He continues to experience flashbacks. He sees himself running toward a yellow wall. He also sees blood on his shirt and a desk. He also sees or thinks about something flying by his face. At his current job, an incident occurred recently involving a client who threatened to shoot someone. He was not at work that day but when he returned, a co-worker discussed the incident to such an extent that he could not stay. He told his supervisor what was going on and his supervisor told him to take the day off. T. 61. Many things, including noises, can trigger his flashbacks. His wife popped some bubble wrap and this "took [him] right back" to the incident. T. 62.

Petitioner testified he "does not believe he will ever get over this." He would like to return to creative endeavors, including writing, but does not know how to get to that place, mentally. His desire for safety is greater than his ambition. T. 67-68.

Under cross-examination, Petitioner testified he took an anti-depressant called "Imipramine" when he was in his early 20s. He has not taken that drug since that time. T. 70. His current problem is different from the depression he experienced at that time. T. 70. His current problem is "much more intense." T. 71. He did not have a disorder when he was in his 20s whereas he has post-traumatic stress disorder now. Dr. Dineen diagnosed this disorder. T. 71. He held the same job title, employment security representative, at both the office on 47th and the office on Diversey. He started working at the office on 47th in April or May 2009 and continued working there until the shooting. T. 72-73. After the shooting, he obtained an accommodation-related note from Dineen in March 2011. He submitted his request for an accommodation in April 2011. The period between the shooting and April 2011 was "very difficult." T. 74. He did not get paid during that interval. T. 75. He did not refuse to work. His boss told him he needed to take time off and to be realistic. He felt like he was working between the shooting and April 2011 because of the time he had to spend gathering paperwork to support his request for an accommodation.

Petitioner testified that the shooting took place right outside the break door. He and the other workers could only use that door when taking breaks. All breaks were to be taken outside that door. There was a "big yellow wall" on that side of the building. There was a McDonald's across the street. There was "a lot of seedy activity" nearby. He was not required to clock in and out when taking a break. He was required to leave his desk and go through the door. The break lasted 15 minutes. On March 17, 2011, his break started at 3 PM. The shooting happened at the end of the break. T. 77-80.

Petitioner testified he always saw Dr. Dineen alone. He and his wife saw Campobazzo together. They started seeing him in November 2017. T. 80-81.

Petitioner testified he performed the same job duties at the Diversey office as he had performed at the original office. He continued to work with clients. On the day of the second accident, the belligerent client initially directed his questions to his co-worker, Yolanda, but then "expressed his frustration to the entire office." T. 82. He did not complete an incident report but, immediately after the incident, he did ask other clients who were there to complete statements. He submitted these statements to unemployment in support of his claim for unemployment benefits. T. 83-84. He never resumed working at the Diversey location after the incident because the office at that location was shut down. T. 84-85. Everyone was laid off about a week after the incident. Everyone was aware of the

upcoming layoff. T. 86. His claim for unemployment was denied. He was told his claim was denied because he abandoned his job. He appealed this decision but was again denied. T. 86-87. He "immediately" started looking for jobs. He limited his job search to positions with the State of Illinois, even though this "drove everyone nuts." He probably applied to 30 jobs with the State. He recalls participating in two job interviews before being hired by Human Services. He presently makes around $65,000 or $70,000 per year. His current salary is considerably higher than the salary he earned at the Department of Employment Security. T. 89-90. Many different things can trigger a flashback. He could experience a flashback when hearing bubble wrap popping or if he saw a brick wall while traveling on a bus. A certain tone of voice could also trigger a flashback. T. 90-91. He is able to walk to work at his current job. T. 92. He currently works full-time. He did not see Dr. Dineen in 2017, 2018 or 2019. His current job involves no contact with the public. He and his co-workers are not supposed to talk to one another. They are supposed to sit down and do their work. T. 94.

On redirect, Petitioner denied having flashbacks before the March 17, 2011 shooting. The sound of his wife popping bubble wrap reminded him of the shooting. This kind of thing did not bother him before the shooting. T. 95-96.

Kevin Duffin, a retired Chicago Police Department commander, testified on behalf of Petitioner. Duffin testified he worked for the Chicago Police Department for almost 36 years. He retired in February 2018. He identified PX 17 as his Curriculum Vitae. He identified PX 12 as copies of the offense report and the detectives' report concerning the shooting of March 17, 2011. He did not create these reports but he supervised the detectives who investigated the shooting. He served as a lieutenant as of March 2011.

Duffin testified that the incident took place in the Kenwood neighborhood. In 2011, Kenwood came in as the tenth best neighborhood in Chicago, in terms of crime. That statistic, however, has to be viewed in the context of Kenwood's size and population. In that context, Kenwood has a high rate of violent crime compared with other neighborhoods.

Duffin testified he spent more than 20 years of his police career as a detective. He was at the scene of 500 to 600 homicides.

Duffin testified that, between 2011 and early 2012, the area where the March 17, 2011 shooting occurred was the scene of one of the bloodiest gang conflicts. The Su-Wu Gangster Disciples and the 47th Street Terror Town were battling over drug sales. The conflict has since resolved, due to the incarceration of some of the perpetrators. In 2011, the neighborhood where the shooting occurred, along with possibly the Englewood and Garfield neighborhoods, were the three highest for random gun violence.

Under cross-examination, Duffin testified he was not personally involved in the investigation of the March 17, 2011 shooting, to the best of his knowledge. Petitioner's counsel is paying him for the time he is spending testifying. He charges $200 per hour for such testimony. He has not worked directly with Petitioner's counsel in the past but he has worked with other members of his law firm.

Petitioner's wife, **Meera Raja,** testified. Raja testified she and Petitioner are approaching their 29th wedding anniversary. T. 135. They live on 8th Street. She feels she knows Petitioner well. She first learned of the March 17, 2011 shooting when a female co-worker of Petitioner called her and told her Petitioner had been shot in the head. She went to the Emergency Room. She observed a wound on the

back of Petitioner's head. T. 136. Petitioner told her he wanted to go home. She observed police officers talking with Petitioner. Petitioner did not understand what had happened. He wanted to go back to work the next day. She told him he could not do that because they did not know who had shot him. T. 137. She and Petitioner spoke with a woman. She told this woman "I can't let him come back there." Petitioner liked his job. Petitioner eventually returned to work at an office on Diversey. He was grateful to be working but he did not like it as much. The commute was longer and his supervisor was not as encouraging. T. 138. She observed changes in Petitioner. He stopped communicating and stayed "more in his own world." He no longer wanted to go out with her or socialize with her family in the suburbs. He did not want to pick up the telephone, even if the caller was his mother or sister. His attitude toward being in the world changed. T. 139-140.

Raja testified that Petitioner is "a little better" now. She and he are now able to talk but the experience is still there. Before the shooting, Petitioner was her "rock." Now his ability to protect her is gone. T. 140.

Raja testified that Petitioner's hobbies, from college forward, included painting and writing. He has not been able to pursue these hobbies since the shooting. At one point, Petitioner was writing a screenplay. Agents expressed interest in it. T. 141. Since the shooting, Petitioner has started pictures but has not been able to finish them. When Petitioner was looking for work, the issue of safety was of much interest to him. That limited his choices. She and he no longer travel to neighborhoods near the area of the shooting. They used to go to Hyde Park to eat at an Indian restaurant but they no longer go there. T. 141-142. Petitioner is now taking anti-depressants. They seem to be helping him. She and Petitioner went to counseling together. Their counselor, Campobasso, counseled her concerning the effects of the shooting. He told Petitioner that Petitioner needs to communicate with her. T. 143.

Under cross-examination, Raja testified she loves Petitioner very much. She would do anything in her power, so long as it was legal, to help him. She is hoping for an award because it would validate his experience. As for the money, they do not need it because she has a well-paying job. She cannot recall when they started couples counseling. That counseling did not have a specific end date. It was decided that Petitioner would pursue individual counseling. T. 143-145.

On redirect, Raja testified the shooting incident affected Petitioner's life. T. 147.

Respondent did not call any witnesses. In addition to the wage statement, Respondent offered into evidence a print-out showing it paid no benefits under the Act. RX 1.

Arbitrator's Credibility Assessment

Petitioner's treating psychologist, Dr. Dineen, did not view Petitioner as misrepresenting or amplifying his symptoms. After the March 17, 2011 shooting, she saw Petitioner on a few occasions. She initially diagnosed Petitioner with acute stress disorder. She found him to be in remission as of May 2011. After the September 2012 incidents, she concluded that Petitioner was experiencing flashbacks and that his condition had progressed to post-traumatic stress disorder. By November 2012, however, she found that Petitioner's post-traumatic stress disorder symptoms were "diminishing" and that other factors were coming into play. At her subsequent deposition, in 2014, she conceded that, while she had previously recommended that Petitioner avoid direct client contact, she "probably" would not have continued to recommend this as of November 2012. She predicted that Petitioner would be "fine" once he found a safe working environment. She never re-evaluated Petitioner. Other counselors saw

Petitioner and his wife in 2017 and 2018 but, for the most part, their records do not mention either work incident. At the October 2019 hearing, Petitioner was adamant that he will never get over his disorder but he did not offer any expert opinion supporting this conclusion.

Arbitrator's Conclusions of Law Relative to 11 WC 21426

Did Petitioner sustain an accident arising out of and in the course of his employment on March 17, 2011? Did Petitioner establish a causal connection between the accident and his claimed current condition of ill-being?

The Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment on March 17, 2011. As for the "in the course of" element, Petitioner credibly testified that he was shot during a sanctioned break on a workday near an entrance he was required to use. The Arbitrator finds that the area where Petitioner was shot was an extension of the workplace, based on Respondent's requirement that employees take breaks outside and use a particular door when exiting and entering the building at break time. T. 78. As for the "arising out of" element, no one contradicted Petitioner's testimony, or that of Kevin Duffin, that the neighborhood outside Respondent's office was very dangerous. The Arbitrator finds that Respondent's break-related requirements, along with the fact that Petitioner was in a position to grant or deny unemployment claims filed by residents of the neighborhood, placed Petitioner at an increased risk of injury over that faced by members of the general public. Petitioner credibly testified he heard someone call "hey, unemployment!" at the time of the shooting. This suggests that the shooting was not a random occurrence. In this respect, the facts of the instant case are stronger than those of Illinois Institute of Technology Research Institute, 314 Ill.App.3d 149 (1st Dist. 2000) and Restaurant Development Group v. Oh, 2009 Ill App LEXIS 407, cases the Court found compensable based solely on the fact that the employees (a security guard in Illinois Institute of Technology and a bartender in Restaurant Development) worked in dangerous neighborhoods where there was gang activity. The claimant in Illinois Institute of Technology was clearly not the target of the bullet that killed him. That bullet traveled 200 feet before striking him. The intended target was an individual being pursued by gang members. This individual ran from a park to the building where the claimant worked. One of the bullets fired by the gang just happened to pierce a window that was 20 feet away from the claimant's work station. The bartender in Restaurant Development also had the misfortune of working near large windows that were pierced by a bullet during a shootout between rival gangs. Petitioner, in contrast, was not simply someone who was in the wrong place at the wrong time. His job involved making decisions that could adversely affect the economic status of the people who lived near his office. In that sense, the case lends itself to an employment, rather than strictly neutral, risk analysis.

What were Petitioner's earnings during the year preceding March 17, 2011? What is Petitioner's average weekly wage?

Petitioner testified he earned $45,000 per year as of March 2011. His two wage-related exhibits, PX 23 (2012 W2 form) and PX 24 (paycheck stub for the period ending December 15, 2011), do not reflect his earnings during the year preceding March 17, 2011, the relevant period for wage calculation. Respondent offered into evidence a summary of Petitioner's monthly earnings during the year preceding March 17, 2011. RX 2. Petitioner did not object to this exhibit. The Arbitrator relies on RX 2 in finding that Petitioner's earnings were $40,958.01 and his average weekly wage is $787.65.

Is Petitioner entitled to reasonable and necessary medical expenses?

In 11 WC 21426, Petitioner seeks unpaid medical expenses from four providers and reimbursement of a prescription expense incurred on July 17, 2019. With respect to the first provider, the Comprehensive Center for Women's Medicine, Petitioner claims $750.00. The Arbitrator, having reviewed the bill from this provider (PX 4) and the accompanying records, awards $635.00, subject to the fee schedule. This amount includes the charges associated with Petitioner's post-accident visits of March 21, March 24 and April 5, 2011. The Arbitrator declines to award the claimed $115.00 associated with a subsequent visit of June 30, 2011 as this visit pertained primarily to a skin disorder having nothing to do with the shooting. The Arbitrator also declines to award the claimed charges from Northwestern Psychology and counselors Pacione and Campobasso. See the medical expense section in 12 WC 36359 below. The Arbitrator further declines to direct Respondent to reimburse Petitioner for the CVS prescription expense incurred on July 17, 2019 as the receipt in evidence (PX 25) does not identify the type of medication or prescribing physician.

Is Petitioner entitled to temporary total disability benefits?

In 11 WC 21426, Petitioner claims two intervals of temporary total disability: March 21, 2011 through June 17, 2011 and September 18, 2012 through July 16, 2014. In 11 WC 21426, the Arbitrator finds that Petitioner was temporarily totally disabled from March 24, 2011 (the date a nurse practitioner affiliated with Dr. Skul recommended he stay off work) through June 15, 2011, the day before he returned to work at the new location on Diversey Avenue.

See below for the Arbitrator's finding concerning Petitioner's claim for additional temporary total disability benefits.

What is the nature and extent of the injury?

The Arbitrator elects to address permanency in the second case, 12 WC 36359. See further below.

Is Respondent liable for penalties or fees?

Petitioner did not file a petition for penalties and fees but claimed penalties and fees at the hearing. Arb Exh 1.

The Arbitrator declines to find Respondent liable for penalties and fees. Petitioner introduced no evidence of a demand for payment in 11 WC 21426. Such a demand is contemplated by Section 19(l). As for penalties under Section 19(k), the Arbitrator is unable to conclude that Respondent acted in an objectively unreasonable manner, under all of the existing circumstances, in denying benefits. Petitioner was shot outside of the building where he worked, while returning from a break.

Arbitrator's Conclusions of Law Relative to 12 WC 36359

Did Petitioner sustain an accident on September 18, 2012 arising out and in the course of his employment?

The Arbitrator finds that Petitioner sustained a compensable "mental mental" injury on September 18, 2012. See, e.g., Moran v. IWCC, 2016 IL App (1st) 151366WC. Petitioner credibly

testified he was working in the front part of Respondent's Diversey Avenue office, close to the door that clients entered, when an irate male client came through the door, got into a co-worker's line and began threatening to shoot people if he did not obtain the result he wanted. Petitioner testified he was about three feet away from the client. T. 40-41. From both a "reasonable person" and personal perspective, Petitioner had cause to fear for his safety. Petitioner might have been more acutely aware than his co-workers of the hazard he faced, given what happened on March 17, 2011, but an employer takes an employee as it finds him. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

As in the earlier case, the Arbitrator concludes that Petitioner faced an employment rather than neutral risk due to his role as an unemployment claims processer. The individual who created the risk of injury on September 18, 2012 was not a random person who wandered in off the street but a client who was upset about the way his claim was being handled. The threat of violence occurred at the workplace, in close proximity to Petitioner, while Petitioner was performing his usual job duties.

Did Petitioner provide Respondent with timely notice of the claimed September 18, 2012 accident?

The Arbitrator finds that Petitioner provided Respondent with timely notice of his September 18, 2012 accident, via the Application he filed on October 19, 2012. Arb Exh 3.

Did Petitioner establish a causal connection between the accident and his claimed current condition of ill-being?

The Arbitrator finds that the accident of September 18, 2012 aggravated the condition resulting from the shooting of March 17, 2011, causing a re-surfacing of symptoms and bringing about the need for additional psychological care through December 14, 2012. The Arbitrator further finds that Petitioner failed to establish a causal relationship between the accident of September 18, 2012 and the couples and individual counseling he underwent with Campobasso and Pacione in 2017 and 2018.

Dr. Dineen testified that, when Petitioner contacted her, after the September 2012 incidents (which she described as beginning on September 1, 2012), he reported having flashbacks to the earlier incident. She concluded that his condition had progressed from acute stress disorder to post-traumatic stress disorder. She also testified that, by late November 2012, Petitioner's post-traumatic stress disorder symptoms were diminishing. Petitioner was still experiencing anxiety but, as Dr. Dineen put it, by November 29, 2012, his anxiety was "again focused more on personal finances and marriage issues." PX 6, pp. 26-27. Although she had recommended a restriction of no client contact on September 18, 2012, she conceded at her 2014 deposition that Petitioner "probably" no longer needed this restriction as of November 20, 2012. PX 6, p. 26. The Arbitrator notes that almost seven years passed between this date and the hearing. While Petitioner testified to ongoing psychological problems which he views as stemming from both incidents, no mental health specialist offered an opinion to that effect. At her deposition, Dr. Dineen opined that Petitioner would be "completely fine" once he was working in a safe environment. She was the provider most familiar with Petitioner's care. There is no evidence indicating she treated Petitioner at any time after December 2012. Petitioner has successfully worked for the State's Department of Health and Human Services since July 2014. He earns substantially more than he did as of the accidents. T. 89-90.

What were Petitioner's earnings during the year preceding September 18, 2012? What is Petitioner's average weekly wage?

In 12 WC 36359, as in 11 WC 21426, Petitioner claims earnings of $45,000 during the year preceding the injury and an average weekly wage of $865.38 while Respondent claims an average weekly wage of $787.65. Petitioner did not testify to his earnings during the year preceding September 18, 2012. Neither of his wage-related exhibits (PX 23 and PX 24) pertain to this period. The Arbitrator defaults to the average weekly wage advanced by Respondent. Walker v. Industrial Commission, 345 Ill.App.3d 1084 (4th Dist. 2004).

Is Petitioner entitled to reasonable and necessary medical expenses?

In 12 WC 36359, Petitioner claims expenses associated with the couples counseling provided by Campobasso (PX 11), the individual counseling provided by Anthony Pacione (PX 10), his two visits to Northwestern in 2018 (PX 15) and reimbursement of a prescription he purchased at CVS on July 17, 2019 (PX 25).

As a preliminary matter, the Arbitrator notes that the documents in PX 11 do not consist of itemized bills from Campobasso. Instead, they consist of BlueCross BlueShield summaries for services provided to Petitioner and his wife. Three of these summaries identify "Meera Raja," not Petitioner, as the patient. Even if the Arbitrator had overruled Respondent's objection and admitted Campobasso's records (PX 13) into evidence, Petitioner has provided no authority which would support the award of a spouse's marital counseling expenses in a workers' compensation claim. Similarly, the documents in PX 15 do not consist of bills from Northwestern. They consist of explanation of benefit forms showing payments by Blue Cross Blue Shield and $0 balances.

The Arbitrator declines to award any of the medical expenses Petitioner claims in 12 WC 36359. As noted above, the Arbitrator finds that Petitioner failed to establish a causal relationship between the 2012 incident and either the marital counseling provided by Campobasso or the individual counseling provided by Pacione. Pacione's initial note mentions a "gunshot trauma" occurring in 2011 and a history of post-traumatic stress disorder but the counseling he provided appears to relate primarily to Petitioner's alcohol intake. Pacione did not opine that Petitioner was still experiencing post-traumatic stress disorder in 2018. Pacione did not testify or issue any reports. The Arbitrator finds the treatment rendered at Northwestern in March and May 2018 to be potentially related to Petitioner's prior diagnosis of post-traumatic stress disorder, based on the history Petitioner provided, but the insurance statements in evidence show $0 balances for the two visits. The Arbitrator finds no basis for holding Respondent liable for the medication expense of $20.00 incurred on July 17, 2019. As noted earlier, the CVS receipt in evidence does not reflect the medication or the prescribing provider. PX 25.

Is Petitioner entitled to temporary total disability benefits?

In 12 WC 36359, the Arbitrator finds that Petitioner was temporarily totally disabled from September 19, 2012 through November 19, 2012, a period of 8 6/7 weeks. The Arbitrator bases this finding on Dr. Dineen's September 18, 2012 work restriction and her subsequent concession, at her deposition, that she likely would not have continued to impose this restriction as of November 20, 2012, given Petitioner's improvement. PX 6, p. 26.

What is the nature and extent of the injury?

The Arbitrator elects to award permanency in this case rather than in 11 WC 21426 because Dr. Dineen testified that Petitioner's diagnosis changed from acute stress disorder to post-traumatic stress

disorder after the incident(s) of September 2012. While she also testified that Petitioner's post-traumatic stress disorder symptoms were "diminishing" by November 2012, she conceded that the disorder can resurface. PX 6, p. 8. At the hearing, Petitioner testified he continues to experience flashbacks. He also testified to taking Wellbutrin for depression and feeling stifled by his current job. [It is not clear who is currently prescribing the Wellbutrin.] He has successfully performed this job for more than four years. While Dr. Dineen testified that depression can accompany post-traumatic stress disorder, she felt the symptoms of post-traumatic stress disorder were diminishing as of November 2012, seven years before the hearing. No psychologist or counselor who treated Petitioner in recent years linked his more recent depressive symptoms, alcohol intake or marital problems to the incidents that occurred eight and nine years ago. Petitioner and his wife make this link but they are not medically qualified to render causation opinions in this case.

The Arbitrator awards permanency based on the following: 1) Dr. Dineen's opinions that Petitioner had diminishing post-traumatic stress disorder as of November 2012 but that people who have had this disorder are susceptible to recurrence; and 2) Petitioner's testimony that he continues to experience flashbacks.

This case is post-amendatory, since the accident occurred after September 1, 2011. Accordingly, the Arbitrator looks to Section 8.1b of the Act for guidance in assessing permanency. That section sets forth five factors to be considered in determining the nature and extent of an injury, with no single factor predominating. The Arbitrator gives no weight to the first factor, any AMA impairment rating, since neither party offered such a rating into evidence. The Arbitrator assigns some weight to the second and third factors, Petitioner's age at the time of the accident and occupation. Petitioner was a 50-year-old unemployment claims processor as of the accident of September 18, 2012. The Arbitrator views him as a middle-aged individual who could conceivably remain in the workforce for another ten to fifteen years. The Arbitrator also assigns some weight to the fourth factor, future earning capacity. On September 18, 2012, Dr. Dineen opined that Petitioner "can return to work in an administrative capacity provided he does not have direct client contact." She retreated from that opinion at her 2014 deposition, indicating that, in retrospect, she "probably" would not have continued to impose this restriction as of November 20, 2012, given Petitioner's improvement as of that date. PX 6, p. 26. The restriction, if in place, would limit the scope of Petitioner's job search but Petitioner restricted that scope further when he decided he would only look for work with Respondent. T. 88. He eventually found a job that pays him substantially more than he earned as of the accident. T. 89. He has successfully performed that job for more than four years.

The Arbitrator, having considered the foregoing, finds that Petitioner established permanency equivalent to 10% loss of use of the person, representing 50 weeks of benefits under Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDGAR MARTIN,

Petitioner,

21IWCC0013

vs.

Nos: 12 WC 36359

ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY,

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 accident, collateral estoppel, medical expenses, temporary total disability, 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, with the changes made below.

In this case, Petitioner claims he suffered Acute Stress Disorder immediately after being shot during a lunch break [11 WC 21426], as well as Post-Traumatic Stress Disorder (PTSD) following a second incident where an unemployment applicant threatened to shoot people in his office [12 WC 36359]. The claims were consolidated for hearing before the Arbitrator. While affirming and adopting the Decision of the Arbitrator in decisions issued separately today, the Commission writes additionally on an evidentiary question and the issue of permanent partial disability benefits.

Regarding the evidentiary question, the Commission observes that Kevin Duffin, a retired commander of the Chicago Police Department (CPD), testified on behalf of Petitioner. Mr. Duffin stated that he had served in the CPD for almost 36 years. He also stated that he supervised the detectives that investigated a March 17, 2011 shooting that gave rise to the incident at issue in 11 WC 21426.

Mr. Duffin testified that Respondent's 47th Street office was in the Kenwood neighborhood, located in the 2nd Police District. He stated that his review of crime statistics for 2011 indicated that the district had a lot of violent crime when compared to other neighborhoods. He opined that in 2011 this neighborhood, Englewood, and Garfield Park probably had the highest amount of random gun violence. Mr. Duffin further opined that assaults with guns were fairly common in the neighborhood. He explained that through 2011 and into 2012, this area had one of the bloodiest gang conflicts in recent history, involving the SuWu Gangster Disciples and the 4-6 Terror Town gang. On cross-examination, Mr. Duffin acknowledged that he was not personally involved in the investigation of the March 17, 2011 shooting that gave rise to Petitioner's claim.

At the outset of Mr. Duffin's testimony, Respondent's counsel objected to the submission into evidence of a police report related to the shooting. The Arbitrator sustained the objection in part and overruled the objection in part. Although Respondent did not renew the objection on review, the Commission observes that any error in the partial admission of the police report would have been deemed harmless, given that Mr. Duffin's expert testimony did not rely upon that report, but upon his professional experience and review of police statistics.

Regarding the issue of issue of permanent partial disability (PPD) benefits, the Arbitrator elected to award benefits in 12 WC 36359 rather than in 11 WC 21426 because Petitioner's psychologist, Dr. Kelly Dineen, testified that Petitioner's diagnosis changed from Acute Stress Disorder to PTSD after the second incident. The Arbitrator awarded permanent partial disability benefits representing a 10% loss of the person as a whole in 12 WC 36359.

Petitioner objects to the denial of PPD benefits in 11 WC 21426, arguing that some permanent disability persisted from the March 17, 2011 shooting. The argument is not persuasive. Where a claimant has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, unless there is some evidence presented at the consolidated hearing that would permit the Commission to delineate and apportion the nature and extent of the permanency attributable to each accident, it is proper for the Commission to consider all the evidence presented to determine the nature and extent of the claimant's permanent disability as of the date of the hearing. See *Village of Deerfield v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 131202WC, ¶¶ 45-50 (discussing *City of Chicago v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 258, 265 (2011) and *Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, 279-80 (2011)). In this case, while the first accident may be characterized as a "physical-mental" claim and the second accident may be characterized as a "mental-mental" claim, both ultimately involve acute and distinct episodes of psychological injury with ongoing symptoms. Petitioner presented no evidence at the consolidated hearing that would permit the Commission to delineate and apportion the nature and extent of the permanency attributable to each accident. Accordingly, the Arbitrator did not err in making a single PPD award in 12 WC 36359.

Lastly, the Decision of the Arbitrator stating that the PPD benefit rate is $472.56 per week is corrected to $472.59 per week.

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

21IWCC0013

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 18, 2012.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $525.10 per week for the period from September 19, 2012 through November 19, 2012, a period of 8 and 6/7ths 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 $472.59 per week for a period of 50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 10% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 10, 2019 is hereby affirmed and adopted with the changes stated herein.

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

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

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: JAN 11 2021
o: 1/7/21
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0013

MARTIN, EDGAR
Employee/Petitioner

Case# **11WC021426**
12WC036359

IL DEPT OF EMPLOYMENT SECURITY
Employer/Respondent

On 12/9/2019, 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 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:

0786 BRUSTIN & LUNDBLAD
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6202 ASSISTANT ATTORNEY GENERAL
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0502 STATE EMPLOYEES RETIREMENT
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PO BOX 19255
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0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

DEC - 9 2019

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

21IWCC0013

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

Edgar Martin
Employee/Petitioner

v.

Ill. Dept. of Employment Security
Employer/Respondent

Case # **11** WC **11262**

Consolidated cases: **12 WC 36359**

(A third case, numbered 14 WC 11262, was voluntarily dismissed on October 18, 2019)

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **October 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. [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?
[X] What were Petitioner's earnings?
G. [ ] What was Petitioner's age at the time of the accident?
H. [ ] What was Petitioner's marital status at the time of the accident?
I. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **March 17, 2011 and September 18, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In each case, Petitioner's average weekly wage was $**787.65.**

On the date of accident, Petitioner was **49 and 50** years of age, *married* with **0** dependent children.

Petitioner ***has in part*** received reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services. RX 1.

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

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

MEDICAL BENEFITS

In 11 WC 21426, the Arbitrator awards Petitioner reasonable and necessary medical expenses of $635.00 from the Comprehensive Center for Women's Medicine (PX 4), subject to the fee schedule. The Arbitrator declines to award any of the other claimed medical and prescription expenses, for the reasons set forth in the attached decision.

TEMPORARY TOTAL DISABILITY

In 11 WC 21426, Respondent shall pay Petitioner temporary total disability benefits of $525.10/week, commencing March 24, 2011 through June 16, 2011, as provided in Section 8(b) of the Act.

In 12 WC 36359, Respondent shall pay Petitioner temporary total disability benefits of $525.10/week, commencing September 19, 2012 through November 19, 2012, a period of 8 6/7 weeks, as provided in Section 8(b) of the Act.

PERMANENT PARTIAL DISABILITY

For the reasons set forth in the attached decision, the Arbitrator elects to award permanency in 12 WC 36359. Respondent shall pay Petitioner permanent partial disability benefits of $472.56/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.

The Arbitrator awards no permanency benefits in 11 WC 21426.

PENALTIES/FEES

The Arbitrator declines to find Respondent liable for penalties or fees.

A third filing, numbered 14 WC 11262, was voluntarily dismissed as of the hearing.

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

Molly C Mason

Signature of Arbitrator

Date 12/9/19

21IWCC0013

Summary of Disputed Issues

Petitioner, an unemployment claims processor based at an office on East 47th in Chicago, testified he and a co-worker were shot at on March 17, 2011 [11 WC 21426], while they were outside the entrance to their building, returning from an afternoon break. Petitioner heard someone yell "hey, unemployment!", felt something fly by his face and witnessed his co-worker get shot in the leg. Petitioner testified he and his fellow employees were required to take their breaks outside in what he perceived as a very dangerous neighborhood. After the incident, Petitioner was transported to Northwestern's Emergency Room, where he was diagnosed with a superficial gunshot wound. A physician removed a bullet from the right posterior scalp. Petitioner was discharged that day with directions to seek follow-up care. On March 21, 2011, Petitioner complained to Dr. Skul of some hesitancy about returning to work in the same neighborhood. On March 24, 2011, a physician's assistant took Petitioner off work and recommended he see Kelly Dineen, Ph.D., a clinical psychologist. Petitioner then underwent a brief course of care with Dr. Dineen. She initially diagnosed "acute stress disorder." On March 29, 2011, she issued a report indicating she anticipated that Petitioner would fully recover within a couple of weeks. On May 15, 2011, she found Petitioner's psychological symptoms to be "in remission."

Petitioner testified he subsequently sought, and was afforded, a transfer to a different Respondent unemployment claims office on West Diversey Avenue. He began working in this office on June 16, 2011. He testified he experienced a resurgence of psychological symptoms on September 18, 2012 [12 WC 36359], when an "irate" male client entered the office, got in the line of a co-worker and began threatening to shoot people. Petitioner testified he alerted his supervisor to the situation and asked to be allowed to work in another area but was rebuffed. He left work and did not return. Petitioner acknowledged knowing, before that incident, that the office was scheduled to close in approximately a week. Following the incident, Petitioner sought unemployment benefits but his claim was denied, following a hearing, due to "job abandonment." He underwent additional care with Dr. Dineen until December 2012. Dr. Dineen initially recommended he work in an environment with no client contact but, at her 2014 deposition, conceded she "probably" would not have continued to make this recommendation as of November 2012. Petitioner testified he conducted a job search, focusing solely on positions with Respondent, until mid-July 2014, at which point he began working as a caseworker in Respondent's Department of Health and Human Services. He was still performing this job at the time of the hearing.

The disputed issues in 11 WC 21426 include accident, causal connection, earnings, medical expenses, temporary total disability from March 21, 2011 through June 17, 2011 and September 18, 2012 through June 16, 2014, nature and extent and penalties/fees. Arb Exh 1. The disputed issues in 12 WC 36359 include accident, notice, causal connection, earnings, medical expenses, temporary total disability from September 18, 2012 through June 16, 2014, nature and extent and penalties/fees. Arb Exh 2.

Procedural Note

At the beginning of the hearing, Petitioner voluntarily dismissed a third claim numbered 14 WC 11262. Respondent raised no objection to the dismissal. T. 4.

Arbitrator's Findings of Fact

Petitioner testified he was born on January 22, 1962. He grew up in Joliet. T. 16. He graduated from high school and attended various colleges. He ended up at Northern Illinois University. T. 16. He studied engineering but has always been passionate about the arts. T. 16. He attended Columbia College after he got married and took film-related courses there. He served in the United States Army and received a badge for marksmanship. PX 27. T. 18-19.

Petitioner acknowledged taking medication for depression when he was in his late 20s. He testified he was "functional" after he discontinued the medication. T. 19.

Petitioner testified he worked in building maintenance, as a doorman and for the Chicago Housing Authority before he started working for Respondent in 2009. After being hired by Respondent, he worked at an office located at 714 East 47th. He processed unemployment claims, denying some and approving others. He also helped people who were looking for work. He testified he enjoyed working with members of the community. T. 21-22.

Petitioner testified he earned about $45,000 per year as of March 2011. T. 24-25. He offered into evidence a copy of a paycheck for the period ending December 15, 2011. This document reflects gross earnings of $40,769.69 for the year to date and a "base amount" of $1,953.24. PX 24. He also offered into evidence a 2012 W2 form indicating Social Security wages of $32,300.76. PX 23. Respondent offered into evidence a CMS wage statement showing a yearly salary of $40,958.01 for the period March 2010 through March 2011. RX 2.

Petitioner described the neighborhood where he worked was very dangerous as of his hiring in 2009. T. 22. He observed people fighting on the street and saw activity going on at the corners. There were "gangbangers" in the area. Some of these individuals were his clients. He sometimes heard gunshots while he was at work. Four or five people were shot and killed in that area. T. 22-24.

Petitioner testified he and a co-worker, Ed White, took a break at about 3 PM on March 17, 2011. T. 29. Petitioner testified he and his fellow employees were required to leave the building to take their breaks. T. 25-26. Their supervisor, Cynthia Hurst, required them to go outside. Petitioner testified that, as he and White were returning from their break, he heard the sound of firecrackers and felt something "whistle" by his face. He and White realized they were being shot at. A bullet went into the back of Petitioner's head, near his right ear. At that point, he and White were about three feet away from the door they were required to use when taking breaks. Petitioner testified he heard someone yell: "hey, unemployment!" He does not know who yelled this. He saw a woman and a man and "had a bad feeling about them." T. 28. He went into "flight mode" and rushed through the door, re-entering the building where he worked. T. 28. The door was on the left side of the building. The wall on that side was yellow. T. 30.

Petitioner testified he saw a co-worker, Cecelia Crenshaw, after he went through the door. He asked her if there was "something back there," indicating the back of his head. She told him he had been shot. The wound started bleeding. T. 30-31. He saw blood on his shirt. He was brought to an office. A male co-worker cried at the sight of him and had to be consoled. Police officers arrived, carrying Ed White, and laid White down in front of Petitioner. White was not able to sit up. T. 32.

Petitioner testified he initially did not want to go to the hospital. Nothing felt real at that point. T. 33. After an ambulance arrived, he was transported to the Emergency Room at Northwestern. A history reflects that Petitioner "was shot by unknown assailants while entering work from break." A head CT scan demonstrated that the bullet was in an area of subcutaneous tissue and "did not penetrate the scalp". A doctor made a 2-centimeter incision, removed the bullet, and sutured the wound. Petitioner was given a tetanus shot and antibiotics. At discharge, Petitioner was instructed to follow up with his primary care provider in one week for suture removal. PX 1, 3.

Petitioner described himself as "in denial mode" after the accident. He had a difficult time processing what had happened. T. 34. He "knew he couldn't return to" the same office. He applied for an FMLA leave. This leave expired May 17, 2011. T. 35. That was a "very difficult period" for him because he "had to fill out a lot of forms." T. 35. He testified he received no benefits while on leave but RX 2 reflects he received a payment of $802.76 for the period March 18, 2011 through March 24, 2011 and accumulated sick pay totaling $802.76 for the period March 25, 2011 through March 31, 2011. He also requested an accommodation in the form of a transfer to a different work location. T. 37. The request was eventually granted. [See further below].

On March 21, 2011, Petitioner saw Dr. Skul, an internist affiliated with the Comprehensive Center for Women's Medicine. The doctor noted that, around 3:20 PM on March 17, 2011, Petitioner and a co-worker were returning to their office, following a break, and were about 6 feet away from the entrance when they heard five shots. The doctor indicated that the co-worker was shot in the leg and that a bullet "lodged" in Petitioner's skull and was later removed. She indicated that Petitioner experienced head pain for about 36 hours after being shot and was no longer experiencing any physical symptoms. She described Petitioner as having "some feelings of hesitancy with regards to taking public transportation or returning to work." She directed Petitioner to return in three days for removal of the sutures and "keep track of physical symptoms and emotional state." PX 3.

Petitioner returned to the Comprehensive Center for Women's Medicine on March 24, 2011 and saw a nurse practitioner. Petitioner denied any physical symptoms but reported some difficulty falling and staying asleep. The doctor noted that Petitioner "realizes he will need to get back to work and does not want his future work capability limited, but simply does not want to get back into that neighborhood." She noted that Petitioner brought forms "to apply for relocation of his primary work assignment." She removed the sutures, noting a small scab. She described Petitioner's behavior, affect and speech as "appropriate to situation." She recommended that Petitioner see Kelly Dineen, PhD, a clinical psychologist [hereafter "Dr. Dineen"], and stay off work "until psych eval and completion of forms for work location transfer." PX 3.

Petitioner first saw Dr. Dineen on March 29, 2011. Dr. Dineen noted a referral from Dr. Hoyer. [No records of Dr. Hoyer from this time period are in evidence.] She recorded the following history:

> "[Petitioner] stated that, on March 17th, he and a co-worker were returning from getting food from a nearby grocery store when he heard shots and felt 'something going across my face'. He saw his co-worker shot in the leg, felt dazed, like everything was in 'slow motion' and then felt 'a lot' of blood running down his face."

Dr. Dineen noted that Petitioner remembered the Emergency Room physician telling him he was "just inches away from being seriously injured or dead." She noted that, since the incident, Petitioner had

felt anxious, restless and unable to concentrate. She also noted that Petitioner was finding it difficult to fall and stay asleep as he was worried about work and "ruminating about what happened." She indicated that Petitioner had been experiencing nightmares and flashbacks of the shooting. She also noted he felt irritable and was "staying home and avoiding going outside."

Dr. Dineen described Petitioner as experiencing a "near traumatic, near death experience" and witnessing the shooting of a co-worker. She found his symptoms consistent with "acute stress disorder" due to the time frame and nature of the symptoms. She recommended a sleep plan, daily yoga and painting for relaxation. She indicated she would continue to assess Petitioner "for progression to PTSD." PX 2.

On March 29, 2011, Dr. Dineen issued a letter addressed "to whom it may concern." She described the shooting and the results of her evaluation of Petitioner. She described Petitioner as a "highly functioning individual with no history of depression or anxiety." She described his current symptoms as a "normal response to a highly traumatic situation." She opined that Petitioner "will return to normal functioning" within "a couple weeks." She indicated it was essential that his request not to return to work at his prior location be honored. PX 2

On March 29, 2011, Dr. Skul completed an "initial workers' compensation medical report" describing the shooting. She estimated that Petitioner would be able to return to work, without restrictions but at a "different work location," as of May 18, 2011. She described Petitioner's prognosis as excellent. PX 7. In a separate CMS physician's statement form, dated April 5, 2011, Dr. Skul noted that Petitioner was supposed to return to her in a couple of weeks, after a psychological evaluation, "for return to work determination." She opined that Petitioner's ability to return to "full work capacity" at a different location was excellent. PX 7.

Petitioner returned to the Comprehensive Center for Women's Medicine on April 5, 2011 and again saw a nurse practitioner. Petitioner reported having seen Dr. Dineen and employing strategies she recommended. He also reported having used Xanax a few times to help with sleep. He indicated he would "see the entrance door to work" in his dreams. He expressed anger and frustration associated with having to complete forms "to get the needed work location transfer in motion." He presented these forms for completion. The nurse practitioner completed the forms. She directed Petitioner to continue taking Xanax at bedtime as needed, along with NuSera during the day to help with anxiety. PX 3.

Petitioner offered into evidence an Employee's Notice of Injury. It appears Petitioner completed and signed this form on April 6, 2011. He indicated he and Ed White, were shot at five times by an "unknown assailant" on the afternoon of March 17, 2011, as they were "returning from break to workplace." Petitioner identified the "place where injury occurred" as "at sideway entrance of 715 W. 47th Street." He indicated a bullet was lodged in the rear right section of his head. PX 8.

Petitioner returned to Dr. Dineen on April 15, 2011 and complained of disturbed sleep. Petitioner indicated he was taking the Ativan that Dr. Hoyer prescribed but did not want to use this on a long-term basis. He also indicated he was doing yoga daily and was painting and writing, "trying to put his experience into words." He indicated he was still experiencing hyper-arousal and was "worried about returning to his workplace" because he felt unsafe. He told Dr. Dineen he wanted to pursue changing work locations. PX 2.

Petitioner saw Dr. Dineen again on April 29, 2011. Dr. Dineen described Petitioner's symptoms as "greatly improving" but indicated Petitioner was still wary around people. She also indicated that Petitioner "states that he is ready to get back to work and is going to different offices to be sure he feels comfortable in the neighborhood."

On May 15, 2011, Petitioner returned to Dr. Dineen and reported feeling "very annoyed" due to the lack of progress with his request to change work locations. Petitioner indicated he felt "at loose ends" not working and was experiencing financial concerns. Dr. Dineen described Petitioner's sleep as "much better" and indicated his symptoms were "in remission." She recommended Petitioner continue with his self-care plan. PX 2.

The Arbitrator sustained Respondent's hearsay objection to PX 18, a letter dated June 8, 2011 sent to Petitioner by the Illinois Department of Employment Security.

Petitioner testified he started working at a Respondent unemployment claims office at 1740 West Diversey on June 16, 2011. He denied working anywhere between the shooting and this date. He performed his regular caseworker duties at the new location. Petitioner testified he noticed a few things that bewildered him after he began working at the Diversey location. He was much more guarded when he interacted with clients. T. 38. If a desperate client came near his desk, it caused him anxiety. He denied experiencing this kind of anxiety before the March 17, 2011 shooting. T. 39.

On June 30, 2011, Petitioner returned to the Comprehensive Center for Women's Medicine and saw Dr. Hoyer. The doctor noted he was being seen for a skin eruption over the mid sternum. She described him as "sleeping better after gunshot wound." PX 3.

On February 10, 2012, Petitioner saw Dr. Hoyer again, in follow-up from an Emergency Room visit for strep throat. The doctor's treatment plan included the following: "talk to Dr. Dineen again as some of the anxiety surrounding the gunshot wound is resurfacing." PX 3.

Petitioner saw Dr. Hoyer again on August 23, 2012, for an annual examination. The doctor noted he was "suffering from lots of symptoms after the shooting he experienced last March 2011." She indicated that the symptoms had worsened in the spring of 2012 and "coincided with wife's wish to move apartments." She also referenced "an episode at work" during which Petitioner "had more anxiety after seeing similar folks at work that reminded him of the people he was shot by." She indicated he reported being called "unemployment" before he and his co-worker were shot at. She described him as feeling anxious that "disgruntled clients will again try to hurt him or his co-workers if they become agitated." She noted he had not informed his current supervisors or co-workers about the shooting incident. She described him as "very fearful of work environment and a particular dark tunnel en route to and from work." She also noted he was in marital counseling and "very stressed" about it. She indicated he felt he might have a tremor. On examination, she noted a faint tremor in the upper extremities. She felt this was likely due to caffeine intake. She prescribed lab work. She recommended that Petitioner wean off caffeine and follow up with Dr. Dineen. PX 3.

Dr. Dineen's treatment notes reflect she spoke with Petitioner by phone on September 1, 2012, with Petitioner reporting that an "incident at work triggered a lot of emotions in him." Petitioner indicated that a "crazy" client had come into the office, talking about shooting people. Petitioner told Dr. Dineen he reported the incident to his supervisor, who did not call the police. Petitioner indicated the supervisor told him to go back to his desk. Petitioner reported feeling "very afraid and anxious" and

leaving the office. Petitioner indicated he had gone to human resources and reported what happened. He described himself as "very, very anxious" and unable to sleep. Dr. Dineen scheduled an appointment for him to come in on "Friday." PX 2.

Petitioner saw Dr. Dineen on September 7, 2012 and reported experiencing flashbacks of a "shadowy figure running toward [him], a brick wall and blood dripping." Petitioner reported feeling very easily aroused and responsive to loud noises and sudden movements. He also reported being easily "triggered" by "gangbangers" he saw on the street or at work. He described himself as withdrawn, angry and "drinking too much in an effort to calm himself down." Dr. Dineen directed Petitioner to stop drinking and resume his self-care plan, "starting with sleep hygiene." PX 2.

Petitioner returned to Dr. Dineen on September 14, 2012 and reported erratic sleep patterns, a "high startle response" and hyperarousal. Petitioner reported that he was "moving out of a sense of denial" and processing that he "could have died" in the March 2011 incident. Petitioner also reported feeling "a lot more angry about what happened," with this having an impact on his marriage. Dr. Dineen noted that Petitioner's post-traumatic stress disorder symptoms were re-emerging and that this was actually "helpful and healing." She again recommended a self-care plan. PX 2.

Petitioner testified he was working in the front section of Respondent's Diversey office on September 18, 2012. He was near the door, where people came in off the street to process claims. T. 39. Yolanda Rodriguez, a co-worker, was working next to him. A doorway was in front of him. A man came through the door and got into the line of people waiting to see Rodriguez. Both he (Petitioner) and Rodriguez were about three feet away from this man. T. 40. The man was "irate" about his claim. He started threatening to shoot people if he did not get a favorable result. Petitioner acknowledged he did not see any weapon. T. 41. Petitioner testified he went to Floyd States, his immediate supervisor, and told States there was someone up front threatening people and he did not want to work up there. He asked States if he could work at his other desk, which was farther back. T. 42. States insisted that Petitioner resume working at the booth that was up front. Petitioner responded, "if you push me, I'll leave," to which States replied "bye." Petitioner then left the office. Petitioner testified he was experiencing a sensation of the "need for flight" that was similar to the sensation he had experienced after he heard gunshots on March 17, 2011. T. 43. It was a "surreal" moment for him because, under ordinary circumstances, he would not leave a job. T. 42-44.

Petitioner testified he never returned to work at the Diversey office. The entire office was laid off. He applied for unemployment benefits. His claim was denied. T. 46.

Petitioner testified he called Dr. Dineen right after he left work, following the September 18, 2012 incident. He told Dr. Dineen he needed to see her again, explaining he had just left a job because "someone threatened to shoot." T. 44.

On September 18, 2012, Dr. Dineen issued a letter addressed "to whom it may concern" indicating that she worked with Petitioner after the March 2011 shooting and that Petitioner's symptoms were "reactivated following a distressing incident at work [September 18, 2012] whereby he felt threatened by a client who exhibited aggressive behavior toward him and a co-worker." She addressed Petitioner's work capacity as follows: "It is my professional opinion that [Petitioner] can return to work in an administrative capacity provided he does not have direct client contact." PX 3.

Petitioner testified that, after being laid off on September 29, 2012, he could function but with difficulty. T. 48. He felt angry, pessimistic and frustrated. T. 47. The feelings he experienced were different from the kind of depression he had experienced in his 20s. T. 47. He started looking for another job. He felt "zombiefied" and was not aware he was "in the midst of a disorder." His marriage "took a hit." T. 49.

Petitioner acknowledged he limited his job search to positions with the State of Illinois, even though "this made a lot of people mad." He came to the State of Illinois building in 2012 and 2013 and took employment-related tests through CMS. T. 50.

On October 17, 2012, Petitioner's counsel wrote to David Van de Burgt, who was then affiliated with the Illinois Attorney General's office. Petitioner's counsel sent Van de Burgt Dr. Dineen's report of October 10, 2012 and demanded that Respondent begin paying temporary total disability. PX 26.

On October 19, 2012, Petitioner filed an Application for Adjustment of Claim in 12 WC 36359 alleging he "received threats while on the job" on September 18, 2012 and aggravated a mental condition. Arb Exh 3.

Petitioner returned to Dr. Hoyer on October 27, 2012 and reported having returned to Dr. Dineen. Dr. Hoyer recorded the following history:

> "Laid off of work on 10/2/12. Prior to that time, there was a client at work who spoke about 'shooting' in the office. Protocol was not followed (police not called) and pt left the premises after he was told to 'go back to the front' to deal with the clients. After he left (in fear – as he was the victim of a shooting near work in March 2011. He was laid off afterwards."

Dr. Hoyer recommended that he continue counseling for post-traumatic stress disorder. PX 3.

On November 9, 2012, the Illinois Department of Employment Security issued a written determination denying Petitioner's claim for unemployment insurance benefits:

> "Did the claimant voluntarily leave employment? The evidence shows that 'the claimant left his place of employment on September 18, 2012 without authorization. The claimant was a "no call no show" from September 18, 2012 through September 26, 2012. The claimant is denied on voluntary leave because he left his employment, he did not call in to report his absences and he abandoned his job."

PX 19.

Petitioner saw Dr. Dineen again on November 29 and December 14, 2012. On November 29th, Dr. Dineen noted that Petitioner had returned to the scene of the shooting and had "found that the wall he was seeing in his flashbacks was real." She indicated that Petitioner was looking for work four days a week. She noted that Petitioner's marriage still remained "a huge source of anxiety," along with his personal finances.

On December 14, 2012, Dr. Dineen noted that Petitioner reported having a disturbing dream in which he felt "stuck" and unable to escape. She indicated he "recognized the parallels to the shooting and the way he is feeling in his life at this point." She also discussed Petitioner's job search. She described Petitioner as continuing to improve. PX 2.

Petitioner returned to Dr. Hoyer on August 27, 2013. The doctor noted that Petitioner had been off work since September 18, 2012, "when a client in the office threatened to shoot and the patient refused to sit at the front desk." She indicated that "the entire office was laid off" a week later. She noted that Petitioner "has PTSD issues and has seen Dr. Dineen re anxiety." She indicated bankruptcy proceedings would be held the next day. She noted that Petitioner and his wife had gone through counseling and were no longer separated. She indicated that Petitioner's "alcohol intake increases with stress to 1 bottle of wine per day." Her diagnoses included "anxiety state, unspecified." PX 3.

Dr. Dineen testified by way of evidence deposition on March 14, 2014. PX 6. Dr. Dineen testified she obtained a Ph.D. in clinical psychology from Northwestern in 1998. PX 6, pp. 4-5. She has been in private practice for 12 years. She sub-specializes in health psychology and sees a lot of people with chronic pain or illness. PX 6, p. 5. She sees probably 5 patients per year who are suffering from post-traumatic stress disorder. At one point, when she was assessing victims of torture, she saw 15 to 20 post-traumatic stress disorder patients per year. PX 6, p. 6. The "cardinal feature" of the disorder is "either you have a personal experience or witness an experience that is a near-death experience." Within the first three weeks of a trauma, people typically have difficulty sleeping, nightmares and anxiety. At this point they have "acute distress disorder." A certain percentage go on to develop post-traumatic stress disorder. Some people have the disorder for life. PX 6, p. 7. It can become dormant and then be triggered by another trauma. PX 6, p. 8.

Dr. Dineen testified she first saw Petitioner on March 29, 2011. She independently recalls Petitioner. He consulted her following a shooting incident. PX 6, p. 8. He was "sort of emotionally numb" and had a startle response. She did not diagnose him with post-traumatic stress disorder at that point because the trauma had just happened. She diagnosed him with acute distress disorder. She next saw Petitioner on April 15, 2011. Petitioner's sleep was still disturbed and he was still experiencing intrusive memories and hyperarousal. By the next visit, on April 29, 2011, Petitioner was calmer and sleeping better. He denied nightmares and flashbacks but still felt uncomfortable around people. PX 6, pp. 10-11.

Dr. Dineen testified she did not hold Petitioner off work during any of his visits through April 29, 2011. By May 15, 2011, Petitioner was saying his previous symptoms were no longer bothering him. His main complaint was not being able to return to work. His anxiety "was not focused around the shooting incident." It was "more about not returning to work and financial issues." PX 6, p. 11. She assessed Petitioner as being in remission from acute stress disorder. PX 6, pp. 11-12.

Dr. Dineen testified she next had contact with Petitioner on September 1, 2012. Petitioner called her that day, requesting an emergency appointment, because of an incident occurring at work. She saw him on September 7th. He told her a crazy client had come into the office talking about shooting people and threatening a co-worker. He went to his supervisor, who did not call the police. He was told to go back to his office. He felt panicky and "left the office." He then went to human resources and explained what had happened. PX 6, p. 12. Dr. Dineen indicated she did not feel Petitioner was capable of staying at work on September 1st. On September 7th, Petitioner related that he was "having

flashbacks of a shadowy figure running towards him and a brick wall with blood dripping." He was responsive to bright lights and sudden movement. He was easily triggered by what he called "gangbangers" on the street. On September 18, 2012, she issued a letter recommending that Petitioner return to work in an administrative capacity with no direct client contact. PX 6, p. 16. In October 2012, she assessed Petitioner as having post-traumatic stress disorder. PX 6, p. 16. In September 2012, Petitioner was "doing a lot of processing of the original trauma." The fact that he could have died and his flashbacks were much more prevalent than they were in the past. PX 6, p. 18. She did not hold Petitioner off work on September 18, 2012. PX 6, p. 18. The focus of a September 25, 2012 session was that he found out he was going to be laid off as of October 1st. Petitioner was "incredibly anxious about that." He also found that the person who was threatening at work was a paroled felon. Her assessment of Petitioner did not change at this time. PX 6, pp. 19-20.

Dr. Dineen testified she more fully assessed Petitioner on October 10, 2012. Petitioner completed the Hopkins symptoms checklist and the Harvard trauma questionnaire. All of the trauma centers use these tests. After Petitioner completed the tests, she assessed him as having post-traumatic stress disorder and major depression, single episode, mild to moderate level. It is very common for people who have experienced trauma to have both post-traumatic stress disorder and depression. PX 6, p. 22. The cause of the post-traumatic stress disorder, for Petitioner, was being shot. PX 6, p. 23. She discussed the use of medication with Petitioner but he did not want to try this. As of October 26, 2012, Petitioner was suffering a lot of marital and financial stress which "kind of exacerbated everything." PX 6, p. 25. As of the next visit, on November 20, 2012, Petitioner was improving and "he felt his PTSD symptoms were diminishing." Petitioner had been laid off as of October 1, 2012. As of November 20, 2012, she would probably not have restricted Petitioner to having no contact with clients. PX 6, p. 26. As of the next visit, on November 29, 2012, Petitioner was continuing to improve and "his anxiety was again focused more on personal finances and marriage issues." PX 6, p. 26. Petitioner was capable of working at that point and was actively looking for work. She last saw Petitioner on December 14, 2012. On that date, he was still improving and they mainly discussed his job search. PX 6, p. 27.

Dr. Dineen opined that, due to the shooting incident of March 17, 2011, Petitioner developed symptoms of acute stress disorder which, over time, emerged into post-traumatic stress disorder. PX 6, p. 28. She further opined that the event of September 1, 2012 "re-triggered" Petitioner's post-traumatic stress disorder. PX 6, p. 28. The initial shooting incident made Petitioner more susceptible to recurrence. The confrontation with a client on September 1, 2012 caused a recurrence of symptoms. In her opinion, it "would not be optimal" for Petitioner to return to work in a high crime neighborhood. If he encountered gang violence or heard shots, that could possibly trigger another episode. PX 6, p. 30.

Dr. Dineen testified her hourly rate of $130 is less than the typical Chicago area charge of $150 to $250. PX 6, pp. 30-31. The treatment she provided to Petitioner was related to the shooting incident and was reasonable. PX 6, p. 31.

With respect to Petitioner's prognosis, Dr. Dineen testified she thinks Petitioner "will be completely fine" if he has work that is in a safe environment. Petitioner is "a smart, creative person" who is "motivated to get work." PX 6, p. 31.

Under cross-examination, Dr. Dineen testified that, as a psychologist, she cannot prescribe medicine. PX 6, p. 32. With respect to the shooting incident, Petitioner told her he heard shots, felt something go by his face, saw a co-worker get shot in the leg, felt dazed and then felt blood running down his face. He felt unusually calm. This is "not an unusual response." PX 6, p. 33. She does not

know where the shooter was. Petitioner did not tell her he saw anyone with a gun. With respect to the September 2012 incident, her understanding is that Petitioner was sitting in an office and his co-worker was close to a "crazy" client. Petitioner left work after that incident. PX 6, p. 35. After Petitioner's four visits in 2011, she felt he could return to work. PX 6, p. 36. In 2012, Petitioner's symptoms were "more severe" than in 2011, as indicated by flashbacks, etc. It was at that point that she changed her diagnosis. PX 6, pp. 38-39. The 2012 incident was triggering because it made Petitioner feel very unsafe. It brought up repressed memories. PX 6, p. 40. She has not seen Petitioner since December 14, 2012. She never took Petitioner off work. PX 6, p. 42. She was Petitioner's therapist. She "wasn't taking him off or on work." Petitioner was negotiating with work on his own and occasionally asked her to write a letter. PX 6, p. 43. Petitioner's financial and marital difficulties certainly played a role in his anxiety. PX 6, p. 43. The post-traumatic stress disorder she diagnosed in 2012 lasted from September to December 2012. PX 6, p. 45.

On redirect, Dr. Dineen testified that a flashback can last just moments. It can be a sign of recovery because the person is bringing back memories that can then be discussed. PX 6, p. 46.

On March 13, 2018, Petitioner saw a nurse practitioner at Northwestern for what he described as "chronic PTSD" stemming from the 2011 shooting. Petitioner also reported depressive symptoms, indicating he underwent treatment for depression for two years when he was in his late 20s. The nurse practitioner described Petitioner as having a "biological predisposition to anxiety and depression." She started Petitioner on Lexapro. Petitioner returned to the same nurse practitioner on May 7, 2018 and reported feeling much better. The records reflect Petitioner discontinued the Lexapro due to side effects but was deriving benefit from the substituted medication, Wellbutrin. Petitioner denied having PTSD-related nightmares and indicated he felt he did not need to resume individual counseling. The nurse practitioner recommended he continue the Wellbutrin and return in one month. A subsequent note, dated August 22, 2018, reflects Petitioner obtained a refill of the Wellbutrin. PX 14.

Petitioner testified he eventually found a job with the State's Department of Health and Human Services. T. 50-51. He started this job on July 16, 2014 and is still there. This is the first job he was offered during his search for employment. T. 51. He is a caseworker who handles problems involving nursing home patients. He deals with paper, not the public. He enjoyed working with real people in the past but he finds his current job safer. The job was also closer to his home so he does not have to travel through unsafe neighborhoods. He feels stifled due to the need to avoid public interaction. He realizes that violence and shootings "can happen anywhere." When he feels stressed at work, he goes to a room where he stretches and performs breathing exercises. He sometimes does this two or three times in one day. He learned the exercises from Dr. Dineen and via yoga. T. 51-54.

Petitioner testified he has not engaged in painting or writing since the shooting because those activities require focus and his thoughts distract him. He finds it difficult to "see something through." T. 55-56.

Petitioner testified he and his wife saw Anthony Campobasso, a social worker, because his symptoms took a toll on his marriage. He and his wife saw Campobasso between November 2017 and January 2018. [The Arbitrator sustained Respondent's relevancy objection to Dr. Campobasso's records. With the exception of a brief allusion to a "shooting event" on the last page, these these records contain no mention of either accident.] Then Campobasso offered to have him see Tony Pacione, LCSW, who is also a social worker. [Records in PX 9 reflect Petitioner saw Pacione between January 9, 2018 and March 12, 2018. In his initial note, Pacione indicated that Petitioner had been referred by "Anthony C"

for individual therapy "for history post-traumatic stress disorder (client was shot in the head by assailant) and ETOH use disorder." Pacione also noted that Petitioner "reports history of depression pre-dated trauma event."] Petitioner testified he started taking Bupropion, a generic form of Welbutrin, an anti-depressant. He testified he continues to experience anxiety but the medication helps him process it. T. 59. He continues to experience flashbacks. He sees himself running toward a yellow wall. He also sees blood on his shirt and a desk. He also sees or thinks about something flying by his face. At his current job, an incident occurred recently involving a client who threatened to shoot someone. He was not at work that day but when he returned, a co-worker discussed the incident to such an extent that he could not stay. He told his supervisor what was going on and his supervisor told him to take the day off. T. 61. Many things, including noises, can trigger his flashbacks. His wife popped some bubble wrap and this "took [him] right back" to the incident. T. 62.

Petitioner testified he "does not believe he will ever get over this." He would like to return to creative endeavors, including writing, but does not know how to get to that place, mentally. His desire for safety is greater than his ambition. T. 67-68.

Under cross-examination, Petitioner testified he took an anti-depressant called "Imipramine" when he was in his early 20s. He has not taken that drug since that time. T. 70. His current problem is different from the depression he experienced at that time. T. 70. His current problem is "much more intense." T. 71. He did not have a disorder when he was in his 20s whereas he has post-traumatic stress disorder now. Dr. Dineen diagnosed this disorder. T. 71. He held the same job title, employment security representative, at both the office on 47th and the office on Diversey. He started working at the office on 47th in April or May 2009 and continued working there until the shooting. T. 72-73. After the shooting, he obtained an accommodation-related note from Dineen in March 2011. He submitted his request for an accommodation in April 2011. The period between the shooting and April 2011 was "very difficult." T. 74. He did not get paid during that interval. T. 75. He did not refuse to work. His boss told him he needed to take time off and to be realistic. He felt like he was working between the shooting and April 2011 because of the time he had to spend gathering paperwork to support his request for an accommodation.

Petitioner testified that the shooting took place right outside the break door. He and the other workers could only use that door when taking breaks. All breaks were to be taken outside that door. There was a "big yellow wall" on that side of the building. There was a McDonald's across the street. There was "a lot of seedy activity" nearby. He was not required to clock in and out when taking a break. He was required to leave his desk and go through the door. The break lasted 15 minutes. On March 17, 2011, his break started at 3 PM. The shooting happened at the end of the break. T. 77-80.

Petitioner testified he always saw Dr. Dineen alone. He and his wife saw Campobazzo together. They started seeing him in November 2017. T. 80-81.

Petitioner testified he performed the same job duties at the Diversey office as he had performed at the original office. He continued to work with clients. On the day of the second accident, the belligerent client initially directed his questions to his co-worker, Yolanda, but then "expressed his frustration to the entire office." T. 82. He did not complete an incident report but, immediately after the incident, he did ask other clients who were there to complete statements. He submitted these statements to unemployment in support of his claim for unemployment benefits. T. 83-84. He never resumed working at the Diversey location after the incident because the office at that location was shut down. T. 84-85. Everyone was laid off about a week after the incident. Everyone was aware of the

upcoming layoff. T. 86. His claim for unemployment was denied. He was told his claim was denied because he abandoned his job. He appealed this decision but was again denied. T. 86-87. He "immediately" started looking for jobs. He limited his job search to positions with the State of Illinois, even though this "drove everyone nuts." He probably applied to 30 jobs with the State. He recalls participating in two job interviews before being hired by Human Services. He presently makes around $65,000 or $70,000 per year. His current salary is considerably higher than the salary he earned at the Department of Employment Security. T. 89-90. Many different things can trigger a flashback. He could experience a flashback when hearing bubble wrap popping or if he saw a brick wall while traveling on a bus. A certain tone of voice could also trigger a flashback. T. 90-91. He is able to walk to work at his current job. T. 92. He currently works full-time. He did not see Dr. Dineen in 2017, 2018 or 2019. His current job involves no contact with the public. He and his co-workers are not supposed to talk to one another. They are supposed to sit down and do their work. T. 94.

On redirect, Petitioner denied having flashbacks before the March 17, 2011 shooting. The sound of his wife popping bubble wrap reminded him of the shooting. This kind of thing did not bother him before the shooting. T. 95-96.

Kevin Duffin, a retired Chicago Police Department commander, testified on behalf of Petitioner. Duffin testified he worked for the Chicago Police Department for almost 36 years. He retired in February 2018. He identified PX 17 as his Curriculum Vitae. He identified PX 12 as copies of the offense report and the detectives' report concerning the shooting of March 17, 2011. He did not create these reports but he supervised the detectives who investigated the shooting. He served as a lieutenant as of March 2011.

Duffin testified that the incident took place in the Kenwood neighborhood. In 2011, Kenwood came in as the tenth best neighborhood in Chicago, in terms of crime. That statistic, however, has to be viewed in the context of Kenwood's size and population. In that context, Kenwood has a high rate of violent crime compared with other neighborhoods.

Duffin testified he spent more than 20 years of his police career as a detective. He was at the scene of 500 to 600 homicides.

Duffin testified that, between 2011 and early 2012, the area where the March 17, 2011 shooting occurred was the scene of one of the bloodiest gang conflicts. The Su-Wu Gangster Disciples and the 47th Street Terror Town were battling over drug sales. The conflict has since resolved, due to the incarceration of some of the perpetrators. In 2011, the neighborhood where the shooting occurred, along with possibly the Englewood and Garfield neighborhoods, were the three highest for random gun violence.

Under cross-examination, Duffin testified he was not personally involved in the investigation of the March 17, 2011 shooting, to the best of his knowledge. Petitioner's counsel is paying him for the time he is spending testifying. He charges $200 per hour for such testimony. He has not worked directly with Petitioner's counsel in the past but he has worked with other members of his law firm.

Petitioner's wife, **Meera Raja,** testified. Raja testified she and Petitioner are approaching their 29th wedding anniversary. T. 135. They live on 8th Street. She feels she knows Petitioner well. She first learned of the March 17, 2011 shooting when a female co-worker of Petitioner called her and told her Petitioner had been shot in the head. She went to the Emergency Room. She observed a wound on the

back of Petitioner's head. T. 136. Petitioner told her he wanted to go home. She observed police officers talking with Petitioner. Petitioner did not understand what had happened. He wanted to go back to work the next day. She told him he could not do that because they did not know who had shot him. T. 137. She and Petitioner spoke with a woman. She told this woman "I can't let him come back there." Petitioner liked his job. Petitioner eventually returned to work at an office on Diversey. He was grateful to be working but he did not like it as much. The commute was longer and his supervisor was not as encouraging. T. 138. She observed changes in Petitioner. He stopped communicating and stayed "more in his own world." He no longer wanted to go out with her or socialize with her family in the suburbs. He did not want to pick up the telephone, even if the caller was his mother or sister. His attitude toward being in the world changed. T. 139-140.

Raja testified that Petitioner is "a little better" now. She and he are now able to talk but the experience is still there. Before the shooting, Petitioner was her "rock." Now his ability to protect her is gone. T. 140.

Raja testified that Petitioner's hobbies, from college forward, included painting and writing. He has not been able to pursue these hobbies since the shooting. At one point, Petitioner was writing a screenplay. Agents expressed interest in it. T. 141. Since the shooting, Petitioner has started pictures but has not been able to finish them. When Petitioner was looking for work, the issue of safety was of much interest to him. That limited his choices. She and he no longer travel to neighborhoods near the area of the shooting. They used to go to Hyde Park to eat at an Indian restaurant but they no longer go there. T. 141-142. Petitioner is now taking anti-depressants. They seem to be helping him. She and Petitioner went to counseling together. Their counselor, Campobasso, counseled her concerning the effects of the shooting. He told Petitioner that Petitioner needs to communicate with her. T. 143.

Under cross-examination, Raja testified she loves Petitioner very much. She would do anything in her power, so long as it was legal, to help him. She is hoping for an award because it would validate his experience. As for the money, they do not need it because she has a well-paying job. She cannot recall when they started couples counseling. That counseling did not have a specific end date. It was decided that Petitioner would pursue individual counseling. T. 143-145.

On redirect, Raja testified the shooting incident affected Petitioner's life. T. 147.

Respondent did not call any witnesses. In addition to the wage statement, Respondent offered into evidence a print-out showing it paid no benefits under the Act. RX 1.

Arbitrator's Credibility Assessment

Petitioner's treating psychologist, Dr. Dineen, did not view Petitioner as misrepresenting or amplifying his symptoms. After the March 17, 2011 shooting, she saw Petitioner on a few occasions. She initially diagnosed Petitioner with acute stress disorder. She found him to be in remission as of May 2011. After the September 2012 incidents, she concluded that Petitioner was experiencing flashbacks and that his condition had progressed to post-traumatic stress disorder. By November 2012, however, she found that Petitioner's post-traumatic stress disorder symptoms were "diminishing" and that other factors were coming into play. At her subsequent deposition, in 2014, she conceded that, while she had previously recommended that Petitioner avoid direct client contact, she "probably" would not have continued to recommend this as of November 2012. She predicted that Petitioner would be "fine" once he found a safe working environment. She never re-evaluated Petitioner. Other counselors saw

Petitioner and his wife in 2017 and 2018 but, for the most part, their records do not mention either work incident. At the October 2019 hearing, Petitioner was adamant that he will never get over his disorder but he did not offer any expert opinion supporting this conclusion.

Arbitrator's Conclusions of Law Relative to 11 WC 21426

Did Petitioner sustain an accident arising out of and in the course of his employment on March 17, 2011? Did Petitioner establish a causal connection between the accident and his claimed current condition of ill-being?

The Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment on March 17, 2011. As for the "in the course of" element, Petitioner credibly testified that he was shot during a sanctioned break on a workday near an entrance he was required to use. The Arbitrator finds that the area where Petitioner was shot was an extension of the workplace, based on Respondent's requirement that employees take breaks outside and use a particular door when exiting and entering the building at break time. T. 78. As for the "arising out of" element, no one contradicted Petitioner's testimony, or that of Kevin Duffin, that the neighborhood outside Respondent's office was very dangerous. The Arbitrator finds that Respondent's break-related requirements, along with the fact that Petitioner was in a position to grant or deny unemployment claims filed by residents of the neighborhood, placed Petitioner at an increased risk of injury over that faced by members of the general public. Petitioner credibly testified he heard someone call "hey, unemployment!" at the time of the shooting. This suggests that the shooting was not a random occurrence. In this respect, the facts of the instant case are stronger than those of Illinois Institute of Technology Research Institute, 314 Ill.App.3d 149 (1st Dist. 2000) and Restaurant Development Group v. Oh, 2009 Ill App LEXIS 407, cases the Court found compensable based solely on the fact that the employees (a security guard in Illinois Institute of Technology and a bartender in Restaurant Development) worked in dangerous neighborhoods where there was gang activity. The claimant in Illinois Institute of Technology was clearly not the target of the bullet that killed him. That bullet traveled 200 feet before striking him. The intended target was an individual being pursued by gang members. This individual ran from a park to the building where the claimant worked. One of the bullets fired by the gang just happened to pierce a window that was 20 feet away from the claimant's work station. The bartender in Restaurant Development also had the misfortune of working near large windows that were pierced by a bullet during a shootout between rival gangs. Petitioner, in contrast, was not simply someone who was in the wrong place at the wrong time. His job involved making decisions that could adversely affect the economic status of the people who lived near his office. In that sense, the case lends itself to an employment, rather than strictly neutral, risk analysis.

What were Petitioner's earnings during the year preceding March 17, 2011? What is Petitioner's average weekly wage?

Petitioner testified he earned $45,000 per year as of March 2011. His two wage-related exhibits, PX 23 (2012 W2 form) and PX 24 (paycheck stub for the period ending December 15, 2011), do not reflect his earnings during the year preceding March 17, 2011, the relevant period for wage calculation. Respondent offered into evidence a summary of Petitioner's monthly earnings during the year preceding March 17, 2011. RX 2. Petitioner did not object to this exhibit. The Arbitrator relies on RX 2 in finding that Petitioner's earnings were $40,958.01 and his average weekly wage is $787.65.

Is Petitioner entitled to reasonable and necessary medical expenses?

In 11 WC 21426, Petitioner seeks unpaid medical expenses from four providers and reimbursement of a prescription expense incurred on July 17, 2019. With respect to the first provider, the Comprehensive Center for Women's Medicine, Petitioner claims $750.00. The Arbitrator, having reviewed the bill from this provider (PX 4) and the accompanying records, awards $635.00, subject to the fee schedule. This amount includes the charges associated with Petitioner's post-accident visits of March 21, March 24 and April 5, 2011. The Arbitrator declines to award the claimed $115.00 associated with a subsequent visit of June 30, 2011 as this visit pertained primarily to a skin disorder having nothing to do with the shooting. The Arbitrator also declines to award the claimed charges from Northwestern Psychology and counselors Pacione and Campobasso. See the medical expense section in 12 WC 36359 below. The Arbitrator further declines to direct Respondent to reimburse Petitioner for the CVS prescription expense incurred on July 17, 2019 as the receipt in evidence (PX 25) does not identify the type of medication or prescribing physician.

Is Petitioner entitled to temporary total disability benefits?

In 11 WC 21426, Petitioner claims two intervals of temporary total disability: March 21, 2011 through June 17, 2011 and September 18, 2012 through July 16, 2014. In 11 WC 21426, the Arbitrator finds that Petitioner was temporarily totally disabled from March 24, 2011 (the date a nurse practitioner affiliated with Dr. Skul recommended he stay off work) through June 15, 2011, the day before he returned to work at the new location on Diversey Avenue.

See below for the Arbitrator's finding concerning Petitioner's claim for additional temporary total disability benefits.

What is the nature and extent of the injury?

The Arbitrator elects to address permanency in the second case, 12 WC 36359. See further below.

Is Respondent liable for penalties or fees?

Petitioner did not file a petition for penalties and fees but claimed penalties and fees at the hearing. Arb Exh 1.

The Arbitrator declines to find Respondent liable for penalties and fees. Petitioner introduced no evidence of a demand for payment in 11 WC 21426. Such a demand is contemplated by Section 19(l). As for penalties under Section 19(k), the Arbitrator is unable to conclude that Respondent acted in an objectively unreasonable manner, under all of the existing circumstances, in denying benefits. Petitioner was shot outside of the building where he worked, while returning from a break.

Arbitrator's Conclusions of Law Relative to 12 WC 36359

Did Petitioner sustain an accident on September 18, 2012 arising out and in the course of his employment?

The Arbitrator finds that Petitioner sustained a compensable "mental mental" injury on September 18, 2012. See, e.g., Moran v. IWCC, 2016 IL App (1st) 151366WC. Petitioner credibly

testified he was working in the front part of Respondent's Diversey Avenue office, close to the door that clients entered, when an irate male client came through the door, got into a co-worker's line and began threatening to shoot people if he did not obtain the result he wanted. Petitioner testified he was about three feet away from the client. T. 40-41. From both a "reasonable person" and personal perspective, Petitioner had cause to fear for his safety. Petitioner might have been more acutely aware than his co-workers of the hazard he faced, given what happened on March 17, 2011, but an employer takes an employee as it finds him. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

As in the earlier case, the Arbitrator concludes that Petitioner faced an employment rather than neutral risk due to his role as an unemployment claims processer. The individual who created the risk of injury on September 18, 2012 was not a random person who wandered in off the street but a client who was upset about the way his claim was being handled. The threat of violence occurred at the workplace, in close proximity to Petitioner, while Petitioner was performing his usual job duties.

Did Petitioner provide Respondent with timely notice of the claimed September 18, 2012 accident?

The Arbitrator finds that Petitioner provided Respondent with timely notice of his September 18, 2012 accident, via the Application he filed on October 19, 2012. Arb Exh 3.

Did Petitioner establish a causal connection between the accident and his claimed current condition of ill-being?

The Arbitrator finds that the accident of September 18, 2012 aggravated the condition resulting from the shooting of March 17, 2011, causing a re-surfacing of symptoms and bringing about the need for additional psychological care through December 14, 2012. The Arbitrator further finds that Petitioner failed to establish a causal relationship between the accident of September 18, 2012 and the couples and individual counseling he underwent with Campobasso and Pacione in 2017 and 2018.

Dr. Dineen testified that, when Petitioner contacted her, after the September 2012 incidents (which she described as beginning on September 1, 2012), he reported having flashbacks to the earlier incident. She concluded that his condition had progressed from acute stress disorder to post-traumatic stress disorder. She also testified that, by late November 2012, Petitioner's post-traumatic stress disorder symptoms were diminishing. Petitioner was still experiencing anxiety but, as Dr. Dineen put it, by November 29, 2012, his anxiety was "again focused more on personal finances and marriage issues." PX 6, pp. 26-27. Although she had recommended a restriction of no client contact on September 18, 2012, she conceded at her 2014 deposition that Petitioner "probably" no longer needed this restriction as of November 20, 2012. PX 6, p. 26. The Arbitrator notes that almost seven years passed between this date and the hearing. While Petitioner testified to ongoing psychological problems which he views as stemming from both incidents, no mental health specialist offered an opinion to that effect. At her deposition, Dr. Dineen opined that Petitioner would be "completely fine" once he was working in a safe environment. She was the provider most familiar with Petitioner's care. There is no evidence indicating she treated Petitioner at any time after December 2012. Petitioner has successfully worked for the State's Department of Health and Human Services since July 2014. He earns substantially more than he did as of the accidents. T. 89-90.

What were Petitioner's earnings during the year preceding September 18, 2012? What is Petitioner's average weekly wage?

In 12 WC 36359, as in 11 WC 21426, Petitioner claims earnings of $45,000 during the year preceding the injury and an average weekly wage of $865.38 while Respondent claims an average weekly wage of $787.65. Petitioner did not testify to his earnings during the year preceding September 18, 2012. Neither of his wage-related exhibits (PX 23 and PX 24) pertain to this period. The Arbitrator defaults to the average weekly wage advanced by Respondent. Walker v. Industrial Commission, 345 Ill.App.3d 1084 (4th Dist. 2004).

Is Petitioner entitled to reasonable and necessary medical expenses?

In 12 WC 36359, Petitioner claims expenses associated with the couples counseling provided by Campobasso (PX 11), the individual counseling provided by Anthony Pacione (PX 10), his two visits to Northwestern in 2018 (PX 15) and reimbursement of a prescription he purchased at CVS on July 17, 2019 (PX 25).

As a preliminary matter, the Arbitrator notes that the documents in PX 11 do not consist of itemized bills from Campobasso. Instead, they consist of BlueCross BlueShield summaries for services provided to Petitioner and his wife. Three of these summaries identify "Meera Raja," not Petitioner, as the patient. Even if the Arbitrator had overruled Respondent's objection and admitted Campobasso's records (PX 13) into evidence, Petitioner has provided no authority which would support the award of a spouse's marital counseling expenses in a workers' compensation claim. Similarly, the documents in PX 15 do not consist of bills from Northwestern. They consist of explanation of benefit forms showing payments by Blue Cross Blue Shield and $0 balances.

The Arbitrator declines to award any of the medical expenses Petitioner claims in 12 WC 36359. As noted above, the Arbitrator finds that Petitioner failed to establish a causal relationship between the 2012 incident and either the marital counseling provided by Campobasso or the individual counseling provided by Pacione. Pacione's initial note mentions a "gunshot trauma" occurring in 2011 and a history of post-traumatic stress disorder but the counseling he provided appears to relate primarily to Petitioner's alcohol intake. Pacione did not opine that Petitioner was still experiencing post-traumatic stress disorder in 2018. Pacione did not testify or issue any reports. The Arbitrator finds the treatment rendered at Northwestern in March and May 2018 to be potentially related to Petitioner's prior diagnosis of post-traumatic stress disorder, based on the history Petitioner provided, but the insurance statements in evidence show $0 balances for the two visits. The Arbitrator finds no basis for holding Respondent liable for the medication expense of $20.00 incurred on July 17, 2019. As noted earlier, the CVS receipt in evidence does not reflect the medication or the prescribing provider. PX 25.

Is Petitioner entitled to temporary total disability benefits?

In 12 WC 36359, the Arbitrator finds that Petitioner was temporarily totally disabled from September 19, 2012 through November 19, 2012, a period of 8 6/7 weeks. The Arbitrator bases this finding on Dr. Dineen's September 18, 2012 work restriction and her subsequent concession, at her deposition, that she likely would not have continued to impose this restriction as of November 20, 2012, given Petitioner's improvement. PX 6, p. 26.

What is the nature and extent of the injury?

The Arbitrator elects to award permanency in this case rather than in 11 WC 21426 because Dr. Dineen testified that Petitioner's diagnosis changed from acute stress disorder to post-traumatic stress

disorder after the incident(s) of September 2012. While she also testified that Petitioner's post-traumatic stress disorder symptoms were "diminishing" by November 2012, she conceded that the disorder can resurface. PX 6, p. 8. At the hearing, Petitioner testified he continues to experience flashbacks. He also testified to taking Wellbutrin for depression and feeling stifled by his current job. [It is not clear who is currently prescribing the Wellbutrin.] He has successfully performed this job for more than four years. While Dr. Dineen testified that depression can accompany post-traumatic stress disorder, she felt the symptoms of post-traumatic stress disorder were diminishing as of November 2012, seven years before the hearing. No psychologist or counselor who treated Petitioner in recent years linked his more recent depressive symptoms, alcohol intake or marital problems to the incidents that occurred eight and nine years ago. Petitioner and his wife make this link but they are not medically qualified to render causation opinions in this case.

The Arbitrator awards permanency based on the following: 1) Dr. Dineen's opinions that Petitioner had diminishing post-traumatic stress disorder as of November 2012 but that people who have had this disorder are susceptible to recurrence; and 2) Petitioner's testimony that he continues to experience flashbacks.

This case is post-amendatory, since the accident occurred after September 1, 2011. Accordingly, the Arbitrator looks to Section 8.1b of the Act for guidance in assessing permanency. That section sets forth five factors to be considered in determining the nature and extent of an injury, with no single factor predominating. The Arbitrator gives no weight to the first factor, any AMA impairment rating, since neither party offered such a rating into evidence. The Arbitrator assigns some weight to the second and third factors, Petitioner's age at the time of the accident and occupation. Petitioner was a 50-year-old unemployment claims processor as of the accident of September 18, 2012. The Arbitrator views him as a middle-aged individual who could conceivably remain in the workforce for another ten to fifteen years. The Arbitrator also assigns some weight to the fourth factor, future earning capacity. On September 18, 2012, Dr. Dineen opined that Petitioner "can return to work in an administrative capacity provided he does not have direct client contact." She retreated from that opinion at her 2014 deposition, indicating that, in retrospect, she "probably" would not have continued to impose this restriction as of November 20, 2012, given Petitioner's improvement as of that date. PX 6, p. 26. The restriction, if in place, would limit the scope of Petitioner's job search but Petitioner restricted that scope further when he decided he would only look for work with Respondent. T. 88. He eventually found a job that pays him substantially more than he earned as of the accident. T. 89. He has successfully performed that job for more than four years.

The Arbitrator, having considered the foregoing, finds that Petitioner established permanency equivalent to 10% loss of use of the person, representing 50 weeks of benefits under Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dritan Sejdini,

Petitioner,

21IWCC0014

vs.

NO: 18 WC 368

Groot Industries,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability, 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 March 2, 2020, is hereby affirmed and adopted.

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

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

21IWCC0014

No bond for removal of this cause to the Circuit Court is required as no award for payment has been entered. 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: JAN 11 2021
o: 12/17/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0014

SEJDINI, DRITAN
Employee/Petitioner

Case# 18WC000368

18WC002814

GROOT INDUSTRIES
Employer/Respondent

On 3/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.44% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5319 DAVID F SZCZECIN & ASSOC LTD
ANDREW A GALICH
205 W RANDOLPH ST SUITE 1801
CHICAGO, IL 60606

0560 WIEDNER & McAULIFFE LTD
MARK WIEDNER
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

21IWCC0014

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

Dritan Sejdini
Employee/Petitioner

v.

Groot Industries
Employer/Respondent

Case # **18** WC **368**

Consolidated cases: **18 WC 2814**

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 4, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **March 24, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**75,400.00**; the average weekly wage was $**1,450.00**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **2** dependent children.

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

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

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

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

ORDER

Medical benefits
Because no first aid, medical, or hospital services were incurred, no medical benefits are awarded.

Temporary total disability
Because Petitioner worked no temporary total disability benefits are awarded.

Permanent partial disability
Because no factor favors permanent partial disability, 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

3/2/2020
Date

MAR 2 - 2020

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

Dritan Sejdini,

Petitioner,

21IWCC0015

vs.

NO: 18 WC 2814

Groot Industries,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability, 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 March 2, 2020, is hereby affirmed and adopted.

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

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

21IWCC0015

No bond for removal of this cause to the Circuit Court is required as no award for payment has been entered. 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: JAN 11 2021
o: 12/17/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0015

SEJDINI, DRITAN
Employee/Petitioner

Case# 18WC002814

18WC000368

GROOT INDUSTRIES
Employer/Respondent

On 3/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.44% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5319 DAVID F SZCZECIN & ASSOC LTD
ANDREW A GALICH
205 W RANDOLPH ST SUITE 1801
CHICAGO, IL 60606

1120 BRADY CONNOLLY & MASUDA PC
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10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

21IWCC0015

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

Dritan Sejdini
Employee/Petitioner
v.
Groot Industries
Employer/Respondent

Case # **18** WC **2814**

Consolidated cases: **18 WC 368**

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 4, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 11, 2017**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**85,644.00**; the average weekly wage was $**1647.00**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **2** dependent children.

Respondent shall be given a credit of $**6,588.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6,588.00**.

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

ORDER

Denial of benefits

Because Petitioner has failed to show he sustained an injury August 11, 2017, that arose out of and in the course of his employment, benefits are denied.

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

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

Signature of Arbitrator

3/2/2020
Date

MAR 2 - 2020

Preface

21IWCC0015

The parties proceeded to hearing December 4, 2019, on a Request for Hearing in both of these consolidated cases. The parties, at the beginning of the hearing, indicated the following disputed issues. In 18 WC 368: whether Petitioner sustained accidental injuries that arose out of and in the course of employment; whether Respondent was given notice of the accident within the time limits stated in the Act; whether Petitioner's current condition of ill-being is causally connected to this injury; whether Respondent is liable for unpaid medical bills; whether Petitioner is entitled to a period of temporary total disability; and what is the nature and extent of the injury. Dritan Sejdini v. Grout Industries, 18 WC 368; 18 WC 2814 (cons.) Transcript of Evidence on Arbitration at 4; Arbitrator's Exhibit 1. In 18 WC 2814: whether Petitioner sustained accidental injuries that arose out of and in the course of employment; whether Respondent was given notice of the accident within the time limits stated in the Act; whether Petitioner's current condition of ill-being is causally connected to this injury; whether Respondent is liable for unpaid medical bills; whether Petitioner is entitled to a period of temporary total disability; and what is the nature and extent of the injury. Sejdini at 5; Arbitrator's Exhibit 2.

Petitioner filed two Applications for Adjustment of Claim, indicating two separate dates of accident. Those filings indicate Petitioner is alleging two claims. 50 Ill Adm. Code Section 9020(b). And so that is how the Applications will be addressed.

Findings of Fact

Dritan Sejdini (Petitioner), a 36 year old male, testified that on March 24, 2017, he was employed by Groot (Respondent) as a driver of a commercial route picking up dumpsters. On March 24, 2017, during a pick up of refuse at Northwestern Hospital, he tried to lift up a dumpster and felt pain in his shoulder. He said he called his supervisor, Alex Haberkamp, and told him what happened. Haberkamp asked him to finish the route. He did and said he filled out an injury report. Sejdini at 11, 24, 25, 26.

Haberkamp testified he was a commercial supervisor for Respondent and remembers Petitioner. He remembers Petitioner calling him March 24, 2017, complaining of paid in his left shoulder while lifting or pushing a dock box. He said Petitioner finished the route and filled out an injury report. He said Petitioner never asked to see a doctor and he did not send Petitioner to a medical facility. Sejdini at 72, 73-76.

Petitioner testified he was asked if he wanted to go to light duty, where he just drove and a helper did the rest of the job, and he agreed. He said he was on light duty for six weeks, then decided he felt better and went back to his regular duties from May to August 2017. Haberkamp testified he put Petitioner on light duty for two to three months, just driving. Sejdini at 27-31, 77, 79.

Petitioner testified he had no medical treatment from March to August 11, 2017, and never went to a physician in May, June, or July. Petitioner testified he gave a recorded statement to Acuity Insurance. That statement indicates he said after he got his helper, his pain went away and for four and a half months everything was "fine." Sejdini at 45, 58, 50; Respondent's Exhibit 1.

While back at work with Respondent, on August 11, 2017, Petitioner testified he was at 711 Church in Evanston, pulling a dumpster when he felt pain. He said he called his supervisor Haberkamp, told him what happened, and of the pain in his shoulder. Petitioner finished his job, made out a report, and asked for medical help. Haberkamp testified he sent Petitioner to a clinic, he was not sure of the exact one, August 11, 2017. Sejdini at 34, 35, 81.

The records of Amita Health Medical Group of August 11, 2017, are largely illegible. What can be gleaned from the records is that Petitioner complained the onset of his pain was March 24, 2017, while lifting heavy material at work. Yet he told Amita the pain went away, but was now recurring. An x-ray of Petitioner's left shoulder showed no fractures or bone deformities. A note of Dr. Salvador Cabanit indicates Petitioner was asymptomatic a month ago. Cabanit diagnosed Petitioner with left shoulder strain with bicipital tendonitis, noting, "He wants to resume his regular work." The Discharge Summary indicated Petitioner was cleared to perform all job functions associated with regular job duties. Petitioner's Exhibit 3 (unpaginated).

Petitioner returned to Amita August 17, 2017, and August 30, 2017, and was placed on modified duty with restrictions on lifting, push/pulling, and reaching. An MRI of Petitioner's left shoulder, done August 28, 2017, indicated: supraspinatus tendinosis with high grade partial-thickness tear along the distal insertion, no retraction of the myotendinous junction; mild degenerative changes at level of acromioclavicular joint; no evidence of fracture or bone marrow edema; tendinopathy of the long head of the biceps tendon. Petitioner's Exhibit 3 (unpaginated); Petitioner's Exhibit 2 (unpaginated).

Petitioner testified he was referred to Barrington Orthopedics. The records of Barrington Orthopedics indicate that by October 6, 2017, Dr. Thomas Obermeyer noted the MRI and assessed Petitioner with a full thickness rotator cuff tear, traumatically induced, and found, although noting it elective, surgery a reasonable option. Petitioner was restricted to light duty, indicating he could drive a truck. Petitioner testified he tried physical therapy and it did not work at all. Petitioner had surgery, a left shoulder arthroscopy with extensive debridement, including coracoplasty arthroscopic rotator cuff repair in the subscapularis and supraspinatus tendons, arthroscopic subacromial decompression, arthroscopically assisted subpectoral biceps tendosis, on November 15, 2017. Petitioner returned to Dr. Obermeyer November 29, 2017. Obermeyer noted Petitioner was not working and his pain was well controlled. He recommended six more weeks of physical therapy and restricted Petitioner's work status to no driving or use of the left arm. Petitioner testified he did the physical therapy and it made the pain much better. Sejdini at 37, 46; Petitioner's Exhibit 2 (unpaginated).

Petitioner gave a recorded statement to Acuity Insurance December 1, 2017. In it, it was difficult to get a straight answer from Petitioner. He did, however, contradict his testimony at trial, saying he did not recall an actual incident in July or August. Respondent's Exhibit 1.

Petitioner submitted to an independent medical examination January 18, 2018, with Dr. Lawrence Lieber. There he told Lieber he was injured March 24, 2017. Petitioner complained to Lieber of weakness and stiffness in his shoulder and difficult with overhead lifting. Lieber conducted a physical examination and reviewed the MRI of August 28, 2017, confirming a tearing of the rotator cuff. He also reviewed records from Amita and Dr. Obermeyer. It was Lieber's opinion there was no objective evidence of injury to Petitioner's left shoulder related to any activities of either August or March 2017. He believed neither event would require treatment or surgery. Respondent's Exhibit 2. Petitioner testified Lieber never asked about the August 11, 2017, accident. Sejdini at 69.

Petitioner testified he went back to work for Respondent August 8, 2018, as a roll off driver, with 95% less work than he was doing on a commercial route. He said he had been paid six weeks temporary total disability.

Conclusions of Law

18 WC 368, date of accident March 24, 2017

Disputed issue **C** is did Petitioner suffer an injury which arose out of and in the course of his employment. To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he suffered injury which arose out of and in the course of his employment. "In the course of employment" refers to the time, place and circumstances surrounding the injury. The "arising out of" component is primarily concerned with causal connection, and is satisfied when the claimant shows the injury had its origin in some risk connected with or incidental to the employment, so as to create a causal connection between the employment and the accidental injury. Noonan v. Illinois Workers' Compensation Commission, 2016 Il App (1st) 1520300 WC, paragraph 16, 18. In order to demonstrate an accidental injury, a claimant must trace the injury to either a specific accident identifiable as to the time and place or the specific moment of collapse of one's physical structure identifiable as to time and place. Luckinbill v. Industrial Commission, 155 Ill. App. 3d 106, 110 (1987),

Here, I find Petitioner suffered an injury that arose out of and in the course of his employment with Respondent. I rely on his unrebutted testimony, corroborated by Haberkamp. Sejdini at 25, 72-75, 77.

Disputed issue **E** is was timely notice of the accident given to Respondent. The act provides that notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. 820 ILCS 305/6 (c). Oral notice is sufficient. See, McLean Trucking Co. v. Industrial Commission, 72 Ill. 2d 350 (1978).

I find timely notice was given to Respondent the day of the accident and rely on the testimony of Petitioner and the corroboration of that testimony by his supervisor Alexander Haberkamp. Sejdini at 25, 72-74. Respondent's placing Petitioner on light duty also corroborates notice.

Disputed issue **F** is whether Petitioner's current condition of ill-being is causally related to the injury of March 24, 2017. An injured employee bears the burden of proof to establish the elements of his right to compensation, including the existence of a causal connection between his condition of ill-being and his employment. Navistar International Transportation Corporation v. Industrial Commission, 315 Ill. App. 3d 1197, 1202-1205 (2002). Petitioner's current condition is status post arthroscopy, rotator cuff repair, debridement, biceps tendodesis left shoulder. He has been back to work since August 2018.

There is no credible evidence this condition is causally related to the injury of March 24, 2017. There were no medical or surgical services rendered to Petitioner from the date of injury through July 2017. There is no testimony or evidence as to exactly what Petitioner suffered March 24, 2017. Liability under the Act cannot rest upon imagination, speculation, or conjecture, but out of facts established by a preponderance of the evidence. Lyons v. Michigan Blvd. Bldg. Co., Inc., 331 Ill. App. 482, 501 (1947).

Disputed issue **J** is, is Respondent liable for unpaid medical bills "to be shown." An employer shall pay according to a fee schedule or negotiated date, all necessary first aid, medical services, and hospital services incurred reasonably required to cure or relieve from the effects of the accidental injury. 820 ILCS 350/8a. Petitioner failed to show, not only any unpaid medical bills for this injury, but that any were incurred. Petitioner himself testified he never had any medical treatment. Sejdini at 45, 58. I find Respondent not liable for what turns out to be phantom unpaid medical bills.

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

Not only did Petitioner fail in his proof, he testified he was on light duty for six weeks, then went back to his regular job. Sejdini at 28, 31. I find Petitioner is not entitled to any temporary total disability benefits in connection with this injury.

Disputed issue **L** is, what is the nature and extent of the injury. The only evidence regarding any injury to Petitioner is his testimony that there was a pain in his left shoulder beginning March 24, 2017, and Alexander Haberkamp's testimony that Petitioner told him he had pain in his left shoulder and was put on light duty for a couple of months. Sejdini at 25, 73, 77-79.

Here, any permanent partial disability is established using the criteria found in 820 ILCS 305/8.1b. As to the level of permanent partial disability, I find as follows.

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

Regarding subsection (ii) of Section 8.1b(b), the occupation of the employee, I note at the time of injury he was, as he testified, "Picking up [dumpsters] buildings, businesses." Essentially, he was a refuse handler. He returned to that job after six weeks of light duty. Sejdini at 11, 28. I give this factor no weight in determining the level of partial disability.

Regarding subsection (iii) of Section 8.1b(b), I note he was 36 years old at the time of the accident and had the recuperative powers of a relatively young man. I give this factor no weight in determining the level of disability.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings, there was no evidence offered by Petitioner, and no testimony from Petitioner, of a diminishment in earnings capacity. 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 treating medical records, there are no medical records as Petitioner sought no medical treatment. I give this factor no weight in determining the level of disability.

While no single factor determines disability, based on a consideration of these factors and the dearth of evidence on this issue, I find no factor favors a determination of permanent partial disability and award no permanent partial disability benefits in this case.

18 WC 2814, date of accident August 11, 2017

Disputed issue **C** is did Petitioner suffer an injury which arose out of and in the course of his employment. The inquiry is as set forth in 18 WC 368.

Here, Petitioner's credibility is compromised. He testified he was injured August 11, 2017, while lifting a box at 711 Church in Evanston. The injury report he completed had conflicting dates and location of an injury. Petitioner's statement to Acuity Insurance made no reference to an injury of August 11, 2017, and in fact Petitioner said he did not recall an actual incident in August 2017. Petitioner did not indicate he hurt his shoulder August 11, 2017, in the initial visit to Amita. Petitioner did not tell Dr. Lieber he was injured August 11, 2017. Sejdini at 34; Respondent's Exhibit 1; Respondent's Exhibit 1; Petitioner's Exhibit 3; Respondent's Exhibit 2. There seems no coherent evidence on this issue.

Moreover, at the close of proofs, the parties were required to render a proposed decision. While not a part of the record, and not an admission of the party, it is a common and effective way to frame issues and cite the evidence presented to support a decision for that party. Here, Petitioner cites no portion of the testimony or evidence that would satisfy Petitioner's burden on the issue, going so far as to conflate the two applications and their dates of injury. An Arbitrator can only decide a case on the testimony and evidence before them, and simply cannot make the case for either party, searching the record and manipulating testimony to cobble together a preponderance of evidence for Petitioner.

I find, as a conclusion of law, Petitioner has failed to show, by a preponderance of the evidence, he sustained an injury August 11, 2017, that arose out of and in the course of his

employment. Therefore, he is not entitled to medical benefits, temporary total disability benefits, or permanent partial disability benefits. Any issue as to notice is moot, as is whether Petitioner's current condition of ill-being causally related to an injury August 11, 2017.

Arbitrator

3/2/2021
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mario Marrero,

Petitioner,

vs.

Islamorada Fish Company,

Respondent.

21IWCC0016

NO: 16 WC 24292

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§ 19(b) and 8(a) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, permanent 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 issues of accident, notice, and causal connection.

I. Accident

Regarding whether Petitioner sustained an accident that arose out of and in the course of his employment, the Commission notes that the Decision of the Arbitrator in this matter was issued prior to the Illinois Supreme Court decision in *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828, which reversed the Commission's determination that the claimant, a restaurant employee whose knee "popped" after kneeling to look for carrots at work, failed to show that his injury arose out of his employment. *Id.* ¶ 2. Our supreme court found that the claimant's knee injury "arose out of" an employment-related risk because the evidence established that at the time of the occurrence his injury was caused by one of the risks distinctly associated with his employment as a sous-chef. *Id.* ¶ 47.

The *McAllister* court further confirmed that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), prescribes the proper test for analyzing whether an injury "arises out of" a

claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." *McAllister*, 2020 IL 124828, ¶ 60. The court overruled *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC and its progeny "to the extent that they find that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public." *McAllister*, 2020 IL 124828, ¶ 64. That is, "[o]nce it is established that the injury is work related, *Caterpillar Tractor* does not require claimants to present additional evidence for work-related injuries that are caused by common bodily movements or everyday activities." *Id.*

Accordingly, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

In this case, Petitioner does not allege that any particular event or acute incident caused his symptoms and, as suggested in the Decision of the Arbitrator, Petitioner may be considered as having alleged a repetitive trauma injury. Petitioner testified that he worked as a cook, spending almost his entire shift in a confined space, spinning back and forth between cooking and preparing plates. Petitioner added that he wore ankle-high non-slip kitchen shoes, which hurt his feet immediately, but which he was required to wear. Although Petitioner later testified that he was not required to buy these shoes from a particular store, Respondent provided him with the name of the company from which to buy the shoes. Petitioner also testified that sometimes, he would stand in front of the sink and wash dishes for the entire shift, both manually and feeding dishes into a dishwashing machine. He testified that he was supposed to receive breaks during his shift, but occasionally could not take them if the restaurant was too busy. Petitioner further testified that he began working double-shifts, approximately 12 hours long. According to Petitioner, as he worked the double-shifts, his feet began to hurt "really bad." He later added that the pain came on gradually over time, continued from day-to-day, and worsened to the point where he could not walk. He explained that his feet would begin hurting incredibly approximately an hour or two into his shift.

The Commission also notes that Petitioner's claim rests on a repetitive trauma theory, and the manifestation date of his injury was alleged to be December 15, 2015, the date that he required medical treatment from Dr. Jennifer Fuehrer at the Foot and Ankle Wellness Center. See *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 72 (2006).

Given the totality of the circumstances, including Petitioner's prolonged, repetitive standing and spinning in painful non-slip shoes of the sort required by Respondent, the Commission concludes that Petitioner's acts are such that Petitioner might reasonably be expected to perform them incident to his assigned duties. Accordingly, the Commission finds

that Petitioner sustained an accident that arose out of and in the course of his employment. See *McAllister*, 2020 IL 124828, ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

II. Notice

The Arbitrator ruled in the alternative that Petitioner did not provide proper notice of his accident to the Respondent. Section 6(c) of the Act requires the claimant to give notice of the accident "to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c) (West 2014). Section 6(c) further provides that "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." *Id.* The notice is jurisdictional, and the failure of the claimant to give notice will bar his claim. *Thrall Car Manufacturing Co. v. Industrial Comm'n*, 64 Ill. 2d 459, 465 (1976). However, a claim is only barred if no notice whatsoever has been given. *Silica Sand Transport, Inc. v. Industrial Comm'n*, 197 Ill. App. 3d 640, 651 (1990). "If some notice has been given, but the notice is defective or inaccurate, then the employer must show that he has been unduly prejudiced." *Id.*

However, "the statutory element of undue prejudice to the employer is pertinent only where some notice is given in the first place." *White v. Illinois Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 910 (2007) (citing *Fenix-Scisson Construction Company v. Industrial Comm'n*, 27 Ill. 2d 354, 357 (1963)).

Our supreme court later elaborated on *Fenix-Scisson's* treatment of the notice issue:

> "In *Fenix-Scisson Construction Co. v. Industrial Com.*, 27 Ill. 2d 354, the employer was officially notified 49 days after the accident concerned and although the claimant's wife had phoned his foreman within the 45-day period and informed him that her husband had been injured, but did not state it was work related, the award was set aside. We said at page 357: 'In the case now before us there was no disclosure at any time of the fact that an accident had occurred, although the employee knew of the occurrence at once and was informed one week later that his injury was the result of the falling board. There is no showing that the employer had actual knowledge of the accident until after the 45-day period had expired. The telephone call by the wife on November 25 did not constitute notice of an accident, defective or otherwise. Nothing whatsoever was said about an accident or any involvement on the part of the employer either then or at any other time. The element of prejudice to the employer is pertinent only where notice is given but it is indefinite or incomplete.'" *Ristow v. Industrial Comm'n*, 39 Ill. 2d 410, 413 (1968).

As noted above, Petitioner alleged a repetitive trauma theory, with the manifestation date of his injury alleged to be the date that he required medical treatment. See *Durand*, 224 Ill. 2d at 72. As the *Durand* court noted, "[r]equiring notice of only a potential disability is a useless act since it is not until the employee actually becomes disabled that the employer is adversely affected in the absence of notice of the accident." *Durand*, 224 Ill. 2d at 68.

In this case, Petitioner alleged an accident date of December 15, 2015 and did not file an Application for Adjustment of Claim until August 9, 2016, following two surgeries and the termination of his employment with Respondent. However, Petitioner testified that he informed his managers, particularly one named Mandy, that his "feet started hurting really bad" and that he could not work double-shifts, but added that he never asked Mandy to work fewer hours because of his feet. Although the exact timing is not stated in Petitioner's testimony, when read in context, these statements appear to have been made shortly after the accident date.

Given this record, as in *Fenix-Scisson*, Petitioner informed Respondent of his injury but did not timely inform Respondent that his employment had some impact on or aggravated his pre-existing foot condition. Indeed, Petitioner acknowledged that he did not inform Respondent of his pre-existing medical condition, at least not before mentioning it to his general manager, Mr. Espinosa. This conversation occurred no earlier than January 20, 2016, when Petitioner underwent a resection of the tarsal coalition with fusion of the subtalar joint of the left foot. The conversation thus occurred long after his claimed accident date and first medical treatment, and made no reference to the cause of his foot pain. Moreover, even assuming for the sake of argument that Petitioner told his manager that he should not work double-shifts, such a statement did not inform Respondent that his injury was work-related or that Petitioner was claiming that it was.

Thus, there is no showing that Respondent had knowledge of any claimed connection between Petitioner's work activities and his pre-existing ankle/foot condition until after the 45-day notice period had run. Accordingly, even though Petitioner established he sustained an accident pursuant to *McAllister*, he did not provide proper notice of that accident to Respondent.

III. Causal Connection

The Arbitrator ruled in the alternative that Petitioner did not establish a causal connection between his injury and his current condition of ill-being. 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); see also *Johnson v. Industrial Comm'n*, 89 Ill. 2d 438, 442-43 (reversing the Commission's award of benefits where claimant failed to present any expert medical evidence supporting her claim that her injuries were caused by repetitive work activities). Thus, repetitive trauma claims involving the alleged aggravation of a preexisting condition generally cannot succeed unless the claimant presents medical testimony suggesting that: (1) he had a preexisting condition that was or could have been aggravated by his repetitive work activities; and (2) his current condition of ill-being was or could have been caused (at least in part) by this work-related trauma and is not simply the result of a normal, degenerative aging process.

In this case, there is no medical evidence to support Petitioner's repetitive trauma theory establishing that his preexisting foot condition was aggravated by his work activities. Petitioner did not submit a medical opinion supporting a finding of causal connection. Respondent offered evidence from Dr. George Holmes, the Section 12 examiner, who opined that there was no causal relationship between the current condition of Petitioner's left foot and his surgery and Petitioner's employment with Respondent. Dr. Holmes further opined that the ongoing condition of the subtalar nonunion was related to Petitioner's post-operative exposure to both Medrol Dosepak and intraarticular injections, as well as continued exposure to steroids. In the doctor's opinion, Petitioner's degenerative disorder and congenital disordered tarsal coalition is the sole cause of Petitioner's need for surgery and his symptoms, though the exposure to steroids is a known factor to decrease bone healing.

In sum, Petitioner failed to provide the medical testimony generally required to establish repetitive trauma claims involving the alleged aggravation of a preexisting condition, while Respondent offered expert testimony opining that Petitioner's activities may have aggravated his pre-existing symptoms, but not his underlying pathology. Accordingly, the Commission concludes that Petitioner failed to prove a causal connection between his injury and his current condition of ill-being.

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

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner sustained an accident that arose out of and in the course of his employment on December 15, 2015.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner provided timely notice of his accident to Respondent.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to establish a causal connection between his accident and his current condition of ill-being.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 23, 2019 is hereby affirmed and adopted as modified herein.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to

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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: JAN 11 2021
o:11/19/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

Concurrence in Part and Dissent in Part

I concur with the majority's finding that the Petitioner sustained an accident. However, I disagree with its conclusions that the Petitioner failed to provide the Respondent with sufficient notice of his accident and that his current condition of ill being is not causally related to his accident. Therefore, I respectfully dissent.

The majority has found that Petitioner informed the Respondent of his injury but did not timely inform the Respondent that his employment had "some impact on or aggravated his pre-existing foot condition." The Act does not require an employee to be aware of or inform the employer that he or she has a pre-existing condition. A Petitioner simply needs to notify the Respondent that he has been injured and that the injury was work related. In this case Petitioner's unrebutted testimony was that he told his assistant manager that:

> "My feet started hurting *really bad* and I couldn't do *doubles back to back* like *they* had me doing because *it* was causing me *extreme* amount of *pain*." (Emphases added.)

Petitioner's statement to his assistant manager was not one simply relaying day to day complaints of pain. The back to back doubles were causing him extreme pain. Additionally, Petitioner informed Respondent's general manager that he was having foot surgery. These conversations occurred within 45 days of Petitioner's December 15, 2015 manifestation date. Therefore, in my opinion, Petitioner provided Respondent sufficient notice of his accident under the Act.

I also believe Petitioner established a causal connection between his injury and his current condition of ill being. While Dr. Holmes testified that there was no such causal connection and that Petitioner was "destined" to have surgery, he did admit that Petitioner's work activities would place additional stress on Petitioner's feet and increase his symptoms. In the years prior to his manifestation date, Petitioner had worked for other restaurants and played sports with minimal discomfort and had not required medical treatment. Only after working the

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"back to back doubles" for weeks did he suffer extreme pain causing him to undergo surgery shortly thereafter.

Dr. Holmes's testimony and the chain of events evidence in this case established that Petitioner's work activities aggravated his pre-existing condition and accelerated his need for surgery. I would have found Petitioner established a causal connection between his injury and his current condition of ill being.

For the forgoing reasons, I respectfully dissent from the decision of the majority.

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0016

MARRERO, MARIO Case# **16WC024292**

Employee/Petitioner

ISLAMORADA FISH COMPANY

Employer/Respondent

On 4/23/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.40% 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:

1886 LEAHY EISENBERG & FRANKEL LTD
SANTIAGO ECHEVESTE
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

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

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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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mario Marrero
Employee/Petitioner

Case # **16** WC **24292**

v.

Islamorda Fish Company
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 12, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 15, 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 $**11,804.52**; the average weekly wage was $**227.01**.

On the date of accident, Petitioner was **22** years of age, ***single*** with **0** dependent children.

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

Respondent ***has*** 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 failed to meet his burden of proof with regard to the issues of accident, notice and causation. The Petitioner's claim for compensation is, therefore, denied.

No benefits are awarded herein.

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

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

Arbitrator Anthony C. Erbacci

April 15, 2019
Date

APR 23 2019

FACTS:

Petitioner testified that he began working for Respondent, Islamorada Fish Company, in December 2014. On cross-examination, however, Petitioner identified Respondent's Exhibit 2 as the Employment Application he completed and he acknowledged that he did not apply to, or work for, Respondent until May of 2015. Petitioner worked part time as a cook and dish washer, and he worked approximately 35 to 37 hours per week. Petitioner testified that his normal shift was 6 hours long and he worked five days per week.

Petitioner testified that his work station while cooking was approximately 5 feet by 3 feet and that he would remain at his station unless he was going to the cooler for additional items. When working as a dish washer, Petitioner would stand in front of a sink and either manually wash dishes or load them into a machine. Petitioner testified that he worked on concrete floor with non-slip ridges cut into it and there were no mats on the floor. Petitioner testified that he was required to wear non-slip kitchen shoes, chef's pants, a shirt and a hat.

Petitioner testified that he was supposed to get breaks, however sometimes the restaurant got too busy and he didn't get to take one. Petitioner testified that during the Christmas holidays, he began to work double shifts on occasion, which would require him to work 12 hours instead of his usual 6 hours. Petitioner testified that double shifts were sometimes voluntary and sometimes scheduled. On cross-examination, Petitioner testified that it was possible that he worked less than 10 double shifts throughout the entire holiday season.

Petitioner testified that he began to notice that his feet were hurting him and he told "Mandy", the assistant manager, that his feet hurt and that he did not want to work back to back double shifts anymore. No incident report or accident report was completed at that time.

Petitioner testified that, prior to his employment with the Respondent, he worked at several other restaurants and that he had no issues with his feet while working for any of these employers. Petitioner also testified that he played baseball in high school and had no problems with his feet. Petitioner acknowledged that he was born with a foot condition and that he had experienced problems with his feet before, but he testified that he had never sought any medical treatment for his feet. Petitioner testified that his pain gradually worsened while working for Respondent and was made worse when he began working back to back double shifts.

On December 15, 2015, Petitioner sought treatment for his foot complaints with Dr. Jennifer Fuhrer at the Foot and Ankle Wellness Center. A history of "bilateral ankle pain for 12 months" is noted as well as bilateral ankle pain which "has been hurting for years." Petitioner was noted to report that he had pain in his ankles since he was a child and that "he has been working doubles . . . and the pain has been getting worse." Dr. Fuhrer diagnosed tarsal coalitions, congenital pes cavus, and foot pain, and she administered steroid injections into both of Petitioner's ankles. On December 29, 2015, Dr. Fuhrer noted that the Petitioner was suffering severe pain in his feet "secondary to tarsal conditions in both feet."

On January 20, 2016, Petitioner underwent a fusion surgery on his left foot. On January 27, 2016, Petitioner underwent a revision surgery on his left foot surgery to replace one of the screws that had been placed during the initial surgery. Petitioner was noted to do well following surgery, and on

March 19, 2016, Petitioner began therapy at Achieve Manual Physical Therapy. The initial physical therapy note indicates "Prior to surgery patient was in constant pain all day, every day, since about age 10." Petitioner continued to treat and on May 26, 2016, Dr. Fuhrer released him to return to work with light duty restrictions.

Petitioner testified that he presented his light duty restrictions to Respondent but they were not accommodated. Petitioner was terminated by Respondent on July 27, 2016 for failing to return from his medical leave of absence.

Petitioner continued to treat for his left foot and underwent a third surgery on September 14, 2016. Dr. Fuhrer released Petitioner to full duty and placed him at maximum medical improvement as of October 17, 2016. After being released from Dr. Fuhrer's care, Petitioner worked in a warehouse and then at Valley View Transportation, where he is currently working. Petitioner currently earns over $16 per hour and he works 7.25 hours a day and 5 days per week.

Petitioner testified that he continues to have pain in his left foot, is unable to run or play sports and can't walk on uneven surfaces without pain. Petitioner is not currently taking prescription medication or any pain medication. Petitioner testified that he also has pain in his right foot.

Daniel Espinosa, Respondent's General Manager, testified that Petitioner was a cook and dish washer for Respondent from May 2015 through January 2016. Mr. Espinosa testified that he was personally familiar with all jobs within the restaurant and regularly performs each of the jobs himself. He testified that the areas that Petitioner worked in had tile floor that was flat and level and there was no change of elevation between the work areas. Petitioner was not required to overcome obstacles, step over anything, or go up or down stairs as part of his job. Mr. Espinosa testified that employees can sometimes work double shifts, however it is not a common occurrence.

Mr. Espinosa testified that employees are to inform management of any work accidents or injuries. Once management is notified, they immediately call their insurance carrier and determine if the injured employee needs to be transported to the doctor or hospital. Mr. Espinosa testified that this procedure is always followed and that he would be contacted by the insurance carrier, even if another manager reported an employee's injury to them. Managers do not notify the insurance carrier if an employee injures themselves outside of Respondent's restaurant or if they merely complain of typical day-to-day pains.

Mr. Espinosa testified that Petitioner did tell Respondent that he was undergoing surgery on his foot, but indicated that it was the due to problems that he had had since birth. Mr. Espinosa testified that Petitioner never indicated that his injuries or need for treatment were related to, or caused by, his work for Respondent. After Petitioner's surgery he was placed on a medical leave of absence and did not return to work when he was released to light duty. Mr. Espinosa testified that had Petitioner attempted to return to work, Respondent would have attempted to accommodate his restrictions, however Petitioner never attempted to return in any capacity. Mr. Espinosa testified that Petitioner was terminated in July 2016 for failing to return from his medical leave.

At the request of Respondent, Petitioner was examined by Dr. George Holmes, a board certified orthopedic surgeon, on December 14, 2017. Dr. Holmes testified that Petitioner had congenital foot deformities prior to any alleged December 15, 2015 injury. Dr. Holmes diagnosed

Petitioner as having congenital pes cavus deformity and a tarsal coalition of both feet. Dr. Holmes indicated that congenital pes cavus is a condition that one is born with, as opposed to being acquired through age, wear, and tear. Similarly, a tarsal coalition is a birth defect that leads to bones failing to separate completely, which leaves a remaining bridge between the bones.

Dr. Holmes testified that Petitioner's conditions were not causally related to his work or employment with Respondent; prolonged standing could aggravate Petitioner's pain, but would not aggravate his underlying birth conditions; Petitioner's degenerative conditions would have independently caused his symptoms and need for surgery; the only way Petitioner would not have needed surgery would be if he never walked whatsoever; Petitioner's work history did not increase his pathology; and any use of the term aggravation is confined to symptomology, not to a structural aggravation.

Dr. Holmes testified that he understood Petitioner to have worked double shifts, which he interpreted as being up to 16 hours, and that the size of the space that Petitioner works in is not germane to his condition or injuries. Dr. Holmes opined that Petitioner's restrictions and treatment were reasonable but unrelated to his work for Respondent.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner failed to prove that an accident occurred, which arose out of and in the course of his employment with Respondent. Therefore, all claims for compensation are denied.

It is axiomatic that the Petitioner 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. A petitioner must establish both the "arising out of" and the "in the course of" elements were present to prove a compensable injury. The mere fact that a petitioner was at work or engaged in some work-related activity is not sufficient to support an award under the Act.

Under the Act, an injury is "accidental" only when, "it is traceable to a definite time, place and cause, is unexpected and "without affirmative act or design of the employee." *Int'l Harvester Co. v. Indus. Comm'n*, 56 Ill. 2d 84, 89, 305 N.E.2d 529, 532 (1973). "Development of symptoms of pain, discomfort, stiffness, etc., without an accident does not meet the test." *Id.* The "arises out of" requirement mandates that the injury must have originated from some risk connected with, or incidental to, the employment so that there is a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill.2d 52, 58, 541 N.E.2d 665, 667 (1989). "In the course of" employment indicates a time, place, and circumstances requirement, under which the accident must have occurred. *Knox Cty. YMCA v. Indus. Comm'n*, 311 Ill. App. 3d 880, 884–85, 725 N.E.2d 759, 762–63 (3d Dist. 2000).

If an injury results out of a hazard to which the employee would be equally exposed to regardless of their employment, or a risk personal to the employee, it is not compensable. *Caterpillar*, 129 Ill.2d 52, 58–59, 541 N.E.2d 665, 667–68 (1989). The court has established three categories of risk based on that principle: (1) risks unique to employment, (2) risks personal to the employee, and (3) neutral risks that are neither employment based nor personal. *Metropolitan Water Reclamation Dist. of Greater Chi. v. Ill. Workers' Comp. Comm'n*, 407 Ill. App. 3d 1010, 1014 (1st Dist. 2011). Employment-related risks are compensable while personal risks typically are not. *Noonan v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 152300WC, ¶ 19, 65 N.E.3d 530, 535 (2017). Neutral risk injuries are generally held not to arise out of employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. *Id.* at 536. "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Metropolitan,* 407 Ill. App. 3d at 1014, 944 N.E.2d at 804.

The purpose of comparing the exposure of an employee to a risk in the course of employment and the exposure of the general public to the same risk is to isolate and identify the distinctive characteristics of the employment. *Caterpillar*, 129 Ill.2d at 62, 541 N.E.2d at 669 (Ill. 1989). The activities of walking, standing and climbing stairs are activities that the general public is constantly exposed to. *Dukich v. Ill. Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶ 26. As the Commission recently stated, "[v]oluminous case law establishes that the act of standing and walking does not constitute a risk greater than that to which the general public is exposed." *Kevin Mcallister v. North Pond*, 14 IL. W.C. 28777 (Ill. Indus. Comm'n Jan. 8, 2016) (citing *Caterpillar*, 129 Ill. 2d at 52; *Oldham v. Indus. Comm'n*, 139 Ill. App 3d 594 (2d Dist. 1985); *Elliot v. Indus. Comm'n*, 153 Ill. App 3d 238 (1st Dist. 1987); *Prince v. Indus. Comm'n*, 15 Ill.2d 607 (1959)). Therefore, the mere act of repetitive standing or walking does not constitute an accident as contemplated under the Act. *Dukich*, 2017 IL App (2d) 160351WC, ¶ 26.

Since the general public is universally exposed to the risks of walking and standing on a daily basis, proving that an employee is more frequently exposed to that risk would be difficult, if not impossible. In fact, recent case law establishes that repetitive walking and standing are not considered compensable accidents under the Act. *See Mcallister*, 14 IL. W.C. 28777 (Ill. Indus. Comm'n Jan. 8, 2016) ("the act of standing and walking does not constitute a risk greater than that to which the general public is exposed"); *Debbie Doggett v. State of Illinois, Dept. of Corrections*, 08 IL. W.C. 05274 (Ill. Indus. Comm'n Dec. 18, 2013) ("The Commission does not believe that the mere act of 'repetitive standing' or 'repetitive walking' constitutes an accident as contemplated under the Workers' Compensation Act."); *Lori Cady v. State of Illinois – Menard Correctional Facility*, 12 IL. W.C. 10991 (Ill. Indus. Comm'n Nov. 14, 2013) ("Simply stated, the Commission does not believe that the mere act of 'repetitive standing' or 'repetitive walking' constitutes an accident as contemplated under the Workers' Compensation Act."); *Julie A. Wright v. Chi. Youth Centers*, 03 I.I.C. 0465 (Ill. Indus. Comm'n July 9, 2003) ("Merely walking or stepping is not a compensable work accident."); *Wible v. Meijer*, 03 I.I.C. 0011 (Ill. Indus. Comm'n Jan. 14, 2003) ("Obviously, just standing and walking on smooth floors is not compensable under current case law."); *Diana Karlman v. Citibank*, 01 I.I.C. 0570 (Ill. Indus. Comm'n July 23, 2001) ("The act of standing and walking does not constitute a risk greater than that to which the general public is exposed.").

The Arbitrator notes that existing case law indicates that standing or walking, regardless of quantity, is not compensable unless there is also a qualitative risk enhancer to which petitioner was more often exposed. Even if there is an increased qualitative risk with the employee's work, the employee must also establish that the accident occurred because of that condition, and the increased risk that resulted.

The evidence in the instant matter reveals that the floor where Petitioner worked was flat, level and made of tile; there was no change of elevation between Petitioner's work areas; there were no obstacle or need to step over anything; Petitioner did not have to go up and down stairs; and it was not common for employees to work double shifts. Petitioner never alleged or testified that there was ever any qualitative risk, specific to his job, which related to his alleged accident or injuries. Instead, Petitioner attributed his injuries to repetitive standing and working double shifts.

Even if Petitioner's job required repetitive standing and walking, there must be some type of qualitative risk that he is more frequently exposed to in order for him to establish a compensable accident. Moreover, Petitioner must experience an increased risk that the general public is not exposed to in order to establish a compensable accident.

Petitioner failed to show that he was exposed to any risk beyond merely walking and standing, therefore he failed to prove his work activities constituted a compensable accident. For the foregoing reasons, all claims for compensation are denied.

In Support of the Arbitrator's Decision relating to (E.), Was timely notice of the accident given to Respondent, the Arbitrator finds and concludes as follows:

Based on the Arbitrator's finding that Petitioner failed to prove an accidental injury arising out of and in the course of his employment with Respondent, the Arbitrator finds that the issue of notice is moot.

Assuming *arguendo,* that Petitioner sustained a compensable accident, the Arbitrator nonetheless finds that Petitioner did not provide proper notice of his accident to Respondent.

Section 6(c) of the Illinois Workers' Compensation Act states that, "Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident." Illinois case law establishes that simply notifying an employer of an injury is insufficient; it is also necessary that the employer be put on notice that the injury is in some way work-related. *See White v. Workers' Comp. Comm'n*, 374 Ill. App. 3d 907, 911 (2007); *see also Fenix & Scisson Construction Co. v. Indus. Com.*, 27 Ill.2d 354 (1963) (holding that Petitioner's wife calling his employer and stating that he was injured, without any indication that the injury was from a work accident, was insufficient).

Defective or inaccurate notice of an accident is not a bar to compensability unless the employer is unduly prejudiced by said defect or inaccuracy. *Silica Sand Transport, Inc. v. Indus. Comm'n*, 197 Ill. App. 3d 640 (3rd Dist. 1990). The element of prejudice to the employer is pertinent only where notice is given but it is indefinite or incomplete. *Fenix*, 27 Ill.2d at 357.

Petitioner alleged that his accident's manifestation date was December 15, 2015. Petitioner underwent two surgeries in January of 2016 and he was terminated by Respondent on July 27, 2016. Petitioner filed his and filed his Application for Adjustment of Claim on August 9, 2016. Petitioner testified that he told an Assistant Manager, Mandy, that his feet hurt and that he did not want to work double shifts anymore. No accident report was completed, and no action was taken by Respondent or Petitioner. Respondent's witness, Daniel Espinosa, testified that Petitioner told Respondent that he was undergoing surgery on his foot, however indicated only that it was the due to problems that he had had since birth. There is no evidence that Petitioner ever indicated that his injuries or need for treatment were related to, or caused by his work for Respondent.

The Arbitrator also finds it significant that when Petitioner left work to undergo surgery, he was placed on a medical leave of absence. There was no mention of workers compensation, coverage of Petitioner's medical care, temporary total disability, or any other benefit.

The testimony demonstrates that Petitioner failed to allege that any work place accident occurred, that his job was the actual cause of any foot pain or injury. For the foregoing reasons, the Arbitrator finds that the Petitioner failed to provide notice of his alleged injury or the details surrounding his alleged injury.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Based on the Arbitrator's decision finding that Petitioner failed to prove an accidental injury arising out of and in the course of his employment with Respondent, the Arbitrator finds that determination of the issue of causation is moot.

Assuming *arguendo,* that Petitioner sustained a compensable accident, the Arbitrator nonetheless finds that Petitioner's condition is not causally related to the alleged accident.

The Supreme Court of Illinois has specifically ruled that an employee who is alleging a repetitive trauma injury carries the same burden of proof as other claimants who allege accidental injury. *Peoria Cty. Belwood Nursing Home v. Indus. Comm'n*, 115 Ill.2d 524, 530, 505 N.E.2d 1026, 1028 (1987). The Plaintiff must show that the alleged injury was caused by their work activity and "not the result of a normal degenerative process." *Id.* An employee's injury is not compensable solely because symptoms arose while the employee was at work, nor is it sufficient that the injury occurred at work, it must be proven that the injury was the result of an accident that was incidental to the employment. *Quarant v. Indus. Comm'n*, 38 Ill.2d 490, 492, 231 N.E.2d 397, 399 (1967); *see also Caterpillar*, 129 Ill.2d at 64, 541 N.E.2d at 670 ("[T]his court is not prepared to adopt the position that whenever an injury is suffered on work premises during work hours it is compensable, regardless of whether the conditions or nature of the employment increased or contributed to the risk which led to the injury.") (citing *Rodriguez v. Indus. Comm'n*, 95 Ill.2d 166, 447 N.E.2d 186 (1983)).

Where there is expert medical testimony suggesting that injuries were caused by a normal aging or degenerative process, the claimant cannot refute this testimony and establish that her injuries were caused by a work-related repetitive trauma unless she presents expert medical evidence regarding causation. *Calhoun Skilled Care v. Ill. Workers' Comp. Comm'n (Gibson)*, 406 Ill.

App. 3d 1220 (4th Dist. 2011). "Cases involving aggravation of a preexisting condition primarily concern medical questions and not legal questions," and "[t]his is especially true in repetitive trauma cases." *Nunn v. Ill. Indus. Comm'n,* 157 Ill. App. 3d 470, 478 (4th Dist. 1987).

If an employee suffers from a preexisting condition, he must show that his condition was aggravated or accelerated by his employment. *See Caterpillar Tractor Co. v. Indus. Com.*, 215 Ill. App. 3d 229, 241, 574 N.E.2d 1198, 1205 (4th Dist. 1991) (citing *General Electric Co.*, 190 Ill. App. 3d 847 (4th Dist. 1989)). Repetitive trauma claims involving the alleged aggravation of a preexisting condition cannot succeed unless the petitioner presents medical evidence that the claimant had a preexisting condition that was or could have been aggravated by the repetitive work activities, and that the current condition of ill-being was or could have been caused by the work-related trauma and was not simply the result of a normal, degenerative aging process. *Calhoun,* 406 Ill. App. 3d 1220.

The Arbitrator finds that the opinions of Dr. Holmes to be credible and persuasive in the instant matter. Dr. Holmes testified that Petitioner's conditions were not causally related to his work or employment; prolonged standing could aggravate Petitioner's pain, but would not aggravate the underlying/structural conditions of pes cavus or tarsal coalition; Petitioner's degenerative conditions would have independently caused his symptoms and need for surgery; the only way Petitioner would not have needed surgery would be if he never walked whatsoever; and Petitioner's work history did not increase his pathology. Dr. Holmes also testified that he understood Petitioner to have worked double shifts, which he interpreted as being up to 16 hours and that this, nor the size of the space that Petitioner worked in, is germane to his condition or injuries.

It is clear from the evidence presented that Petitioner had a congenital and degenerative condition that existed since birth. Petitioner offered no medical evidence to support his theory that his current condition of ill-being is causally related to his employment with Respondent. Petitioner further failed to provide evidence that his injuries were caused by his work activity and not the result of a normal degenerative process. Additionally, Petitioner has failed to in any way rebut Dr. Holmes's opinions that his employment did not cause or aggravate his underlying conditions.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that Petitioner failed to prove that his condition of ill-being is causally related to his alleged December 15, 2015 accident.

Based upon the Arbitrator's findings and conclusions relating to the issues of accident, notice and causation, determination of the remaining disputed issues is moot.

Petitioner's claim for compensation is denied, and no benefits are awarded herein.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alejandro Perez,

Petitioner,

vs.

No. 15 WC 25131 consolidated w/
15 WC 25132

Labor Temps, Inc.,

Respondent.

21IWCC0017

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Labor Temps, Inc. ("Labor Temps") herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, number of dependents, benefit rates, temporary disability and permanent disability, and being advised of the facts and law, vacates the Amended Arbitration Decision and remands this case to the Arbitrator for further proceedings consistent with the issues stated below, and for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327 (1980).

The Petition for Review in this matter, and the associated issues, has brought to light numerous defects in the arbitration process requiring a remand to clarify the record below. In so remanding, the Commission highlights various procedural and substantive facts presented in these claims.

On July 17, 2015, Petitioner, a 43-year-old laborer, filed two Applications for Adjustment of Claim alleging that he sustained lumbar injuries in separate work accidents first on January 19, 2015 (Claim No. 15 WC 25131) and later on July 7, 2015 (Claim No. 15 WC 25132). In those Applications, Petitioner named only one Respondent, Labor Temps, as his employer. He also alleged that at the time of his accidents, he was single and had three dependent children under age 18.

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On September 21, 2015, Petitioner filed an Amended Application for Adjustment of Claim in each case in which he named an additional employer. In 15 WC 25131, Petitioner added Respondent, Innovative Plastech; and in 15 WC 25132, Petitioner added Respondent, VIM Recyclers ("VIM Recyclers"). In each Amended Application, Petitioner again alleged that he was single, with three dependent children under age 18 at the time of his accidents.

Thereafter, Petitioner filed a Motion to Consolidate both claims on September 13, 2016, which does not reveal notice of the motion was provided to either Innovative Plastech or VIM Recyclers. Petitioner's claims were consolidated by order of an Arbitrator on November 4, 2016.

On August 16, 2018, both of Petitioner's claims naming both Labor Temps, Innovative Plastech and VIM Recyclers proceeded to a hearing before Arbitrator Steffen. At that hearing, two Request for Hearing forms were completed, one for each claim number. However, in each, only Labor Temps was listed as the named Respondent. Petitioner and Labor Temps, through their attorneys, signed the Request for Hearing forms in which they stipulated, for both alleged accidents, that Petitioner's average weekly wage was $360.00 and that he was single with no dependent children under the age of 18. No mention was made of the second named employers and Respondents, Innovative Plastech and VIM Recyclers, on either Request for Hearing form. The transcript reveals that neither Innovative Plastech nor VIM Recyclers appeared at the arbitration hearing. The Commission cannot determine from the record below whether Innovative Plastech or VIM Recyclers were provided with notice of the hearing on the consolidated claims.

On November 29, 2018, Arbitrator Steffen issued two decisions, one for each claim number. However, as with the Request for Hearing forms, the second named employers and Respondents, Innovative Plastech and VIM Recyclers, were not included in the caption of either decision. The Arbitrator found that Petitioner was single and had no dependent children under age 18 at the time of either accident. The Arbitration decisions issued by the Commission only provided notice to counsel for Petitioner and Labor Temps.

Thereafter, both parties filed Motions to Correct Clerical Errors pursuant to §19(f) of the Act with an Arbitrator to whom the cases were subsequently assigned. The motions failed to show notice to Innovative Plastech or VIM Recyclers. Petitioner's Motion alleged that, as of August 7, 2015, Petitioner was married and had three children, and the motion included documentation supporting Petitioner's claimed dependents. Petitioner requested, in his motion, that the Arbitrator's decisions be corrected to reflect that he had four (4) dependents at the time of his accidents, and that his temporary total disability rate and permanent partial disability rate for each accident should be corrected to reflect the statutory minimum rate of $330.00.

Labor Temps filed a response to Petitioner's motion on January 19, 2019. In it, Labor Temps claimed that the parties had stipulated at arbitration that Petitioner was single with no dependent children, that Petitioner presented no evidence at the hearing to show that he was married with children, and that his motion should be denied because it sought to address a

substantive, not clerical, issue. Labor Temps' response to Petitioner's motion also fails to show notice to Innovative Plastech or VIM Recyclers.

On March 1, 2019, Arbitrator Soto, who heard the parties' §19(f) motions, entered an order granting Petitioner's motion. Arbitrator Soto also issued Amended Arbitration Decisions, in which he found that, at the times in question, Petitioner was single with three dependent children. These Amended Decisions purportedly corrected the original decisions issued by Arbitrator Steffen in both case numbers, but also failed to include the second named employer and Respondent in each case, Innovative Plastech and VIM Recyclers, in the respective captions of each decision. Arbitrator Soto found that the number of dependents found by Arbitrator Steffen in her original Arbitration Decisions was a "scrivener's error," because, "Respondent was aware, based upon the Application for Adjustment of Claims, that Petitioner had 3 children or dependents." As with the original decisions, the Amended Arbitration Decisions issued by the Commission only provided notice to counsel for Petitioner and Labor Temps.

Labor Temps timely filed its Petition for Review related to this claim, and in the consolidated case, on May 8, 2019. Notice was not provided to Innovative Plastech or VIM Recyclers. Neither Innovative Plastech nor VIM Recyclers appeared at oral arguments or, took part in the petitions for review.

The Commission, during its *de novo* review, has evaluated the record below. It is clear that the consolidation of Petitioner's claims, the arbitration hearing, the Section 19(f) motion, all of the arbitration decisions, the petitions for review, and the briefs have proceeded as to two Respondents, but without proper notice to or inclusion of all parties. The Amended Application for Adjustment of Claim filed by Petitioner on September 21, 2015 in case number 15 WC 25131 reflects notice was sent to Labor Temps, Innovative Plastech and an adjuster for Gallagher Bassett Services. In case number 15 WC 25132, the Amended Application was sent to Labor Temps, VIM Recyclers and an insurance adjuster from Gallagher Bassett Services. Counsel for Petitioner and Labor Temps appeared at oral arguments and confirmed that the Commission's records are accurate indicating two consolidated claims amended by Petitioner to include two Respondents, a lending and borrowing employer, who are purportedly jointly and severally liable if Petitioner were to prevail. It is evident from the proceedings below that counsel for Petitioner and Labor Temps proceeded as though the alleged employers were correct and that the claims had been properly consolidated. It is equally evident that the Commission issued all four arbitration decisions to Petitioner and only one Respondent, Labor Temps, despite Amended Applications for Adjustment of Claim on file which reflect other Respondents, Innovative Plastech and VIM Recyclers.

In the absence of evidence establishing that all of the proceedings as of the time that Innovative Plastech and VIM Recyclers were added as Respondents in these claims were properly held with notice to those Respondents, the Commission finds it necessary to vacate the Amended Arbitration Decisions and remand the cases for a new hearing with proper notice to all proper

parties. For these reasons, the Commission vacates the Amended Arbitration Decision and remands this case back to the Arbitrator for such determinations.

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

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

DATED: JAN 12 2021
o-11/19/2020
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
AMENDED

PEREZ, ALEJANDRO
Employee/Petitioner

Case# **15WC025131**
15WC025132

LABOR TEMPS INC
Employer/Respondent

21IWCC0017

On 3/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0147 CULLEN HASKINS NICHOLSON ET AL
DAVID B MENCHETTI
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

5001 GAIDO & FINTZEN
GAIL BEMBNISTER
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

21IWCC0017

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

AMENDED ARBITRATION DECISION

Alejandro Perez
Employee/Petitioner

Case # 15WC025131
Consolidated cases: 15WC025132

Labor Temps, Inc.
Employer/Respondent

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

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On 07/07/2015, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

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

On the date of accident, Petitioner was 44 years of age, single with 3 dependent children.

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $0 for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $0. Respondent shall be given a credit for all medical bills that Respondent has paid directly to the following providers, if any: Provena Mercy Medical Center, Rehab Dynamix, Dr. Rhode, Dr. Rinella, Silver Cross Hospital and ATI Physical Therapy.

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

ORDER

Respondent shall pay to Petitioner reasonable and necessary medical services, pursuant to the medical fee schedule and pursuant to Section 8(a) and Section 8.2 of the Act for all reasonable, necessary and related medical treatment, including the services of Provena Mercy Medical Center, Rehab Dynamix, Dr. Rhode, Dr. Rinella, Silver Cross Hospital and ATI Physical Therapy. Respondent shall be given a credit for all medical benefits that have been paid directly by respondent to these medical providers and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Respondent shall pay to Petitioner temporary total disability benefits of $319.00 per week for 72 2/7 weeks, commencing July 8, 2015 through November 28, 2016, as provided in Section 8(b) of the Act.

Respondent shall pay to Petitioner permanent partial disability benefits of $319.00 per week (statutory minimum) for 125 weeks because the injuries sustained caused the 25% loss of the person as a whole as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

3/1/19
Date

MAR 4 - 2019

15WC25131, 15WC25132

21IWCC0017

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

AMENDED ARBITRATION DECISION

Alejandro Perez
Employee/Petitioner

Case # 15WC025132

Consolidated cases: 15WC025131

Labor Temps, Inc.
Employer/Respondent

An Application for Adjustment of Claim was filed in this matter, and a Notice of Hearing was mailed to each party. The matter was heard by the Honorable Ketki Steffen, Arbitrator of the Commission, in the city of Geneva 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?

STATE OF ILLINOIS

21IWCC0017

COUNTY OF Kane

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Alejandro Perez,
Employee/Petitioner,

Case # 15 WC 025131

Consolidated cases: 15 WC 025132

Labor Temps
Employer; Respondent.

Procedural History

Case number 15 WC 025131 is related to an accident date of July 7, 2015. Case number 15 WC 025132 is related to an accident date of January 19, 2015. The matters are consolidated and were tried on the merits on August 16, 2018. Petitioner and Respondent timely filed motions to correct clerical errors in the decision pursuant to Section 19(f) of the Act. Respondent asserts the Decision awarded both 25% and 45% loss of use of a person pursuant to Section 8(d)(2) of the Act when the Arbitrator intended to award $25% loss of use of a person. Petitioner asserts Petitioner was married with 3 children and had 4 dependents. The Application for Adjustment of Claims show that Petitioner was single but had 3 dependents under the age of 3. The Request for Hearings indicate that Petitioner was single with no dependents. The Arbitrator finds that the loss of use of a person and number of dependents were scrivener's errors. Regarding the number of dependents, Respondent was aware, based upon the Application for Adjustment of Claims, that Petitioner had 3 children or dependents. The Worker's Compensation Act is a humane law of a remedial nature. The underlying purpose of the act is to provide financial protection for workers whose earning power is interrupted or term as a consequence of injuries arising out of and in the course of heir employment. See *World Color Press v. Industrial Comm'n*, 249 Ill.Ap.3d 105, 619 N.E.2d. 159, 188 Ill.Dec. 795 (5th Dist. 1993); See also *Hardin Sign Co. v. Industrial Comm'n* (1987) 154 Ill.App.3d. 386, 107 Ill.Dec. 175, 506 N.E. 2d 1066.

Factual History

Petitioner, Alejandro Perez, testified that on January 19, 2015, he was employed for the Respondent, Labor Temps, as a laborer. Petitioner further testified the majority of the time his job was to lift and carry things from one place to another. Petitioner testified that on January 19, 2015,

he was carrying metal stands weighing 70 to 80 pounds. After carrying ten stands, he felt pain to the low part of his back.

Petitioner reported to Physicians Immediate Care. Petitioner was assessed with low back pain and placed on restrictions of lifting no more than 20 pounds (PX l). According to the records, Petitioner stated there was no radiation of pain down his legs. Petitioner additionally stated his back pain began eight days ago, and he suffered a back injury six years ago, which resulted in sciatica and radiation down the leg [PX l]. Petitioner then followed-up on January 26, 2015, stating his pain was improved and rated his pain 2/10. Petitioner had a normal physical examination and was released from care at maximum medical improvement at full duty [PX l].

Petitioner testified he did not have a back injury six years prior. He further testified he did not tell the provider his pain began eight days prior. Petitioner also testified the pain to his legs began fifteen days after the incident. Petitioner did not return to work for Respondent until approximately May 1, 2015. Petitioner did not seek any medical treatment during this time period, testifying this was due to lack of insurance. Petitioner testified upon returning to work, it was difficult to bend down and pick things up, but he was able to keep working.

Petitioner testified that while working for Respondent on July 7, 2015, he was lifting a roll of plastic weighing 50 to 60 pounds. While doing this, Petitioner testified he felt pain to his low back. Petitioner then reported to Provena Mercy Medical center in Aurora on July 8, 2015 [PX 2]. Petitioner was diagnosed with low back and was provided pain medication.

Petitioner then followed up at Rehab Dynamix on July 15, 2015 and underwent a course of physical therapy [PX 3]. Petitioner was restricted from work on July 15, 2015 and an MRI of the low back was ordered [PX 3]. An MRI was undergone on July 20, 2015 and injections were recommended. Petitioner underwent a L5-Sl epidural injection on October 20, 2015.

Petitioner came to treat with Dr. Anthony Rinella on November 13, 2015 [PX 8]. Dr. Rinella testified Petitioner complained of back pain radiating down his left leg from a work injury on January 19, 2015. Petitioner reported to Dr. Rinella he returned to work without restrictions on July 7, 2015. Dr. Rinella testified he diagnosed Petitioner with L5-Sl degenerative disc disease, L5-Sl disc herniation, and neurogenic claudication secondary to spinal stenosis at L4-5 [PX 8]. A L4-Sl laminectomy was recommended. Petitioner ultimately underwent surgery on December 28, 2015 [PX 8].

Following the surgery, Petitioner underwent a course of physical therapy. Petitioner additionally complained of pain to the left hip, for which he received injections [PX 8]. A FCE was performed on July 12, 2016, which set Petitioner's physical demand level at medium. [PX 8]. Petitioner was released to full duty restrictions on November 28, 2016 [PX 8]. Dr. Rinella testified Petitioner may have intermittent low-back pain that is on-going, but not permanent physical restrictions [PX 8].

Petitioner testified he returned to work on December 1, 2016. On cross-examination, Petitioner testified he now works 40 hours a week and receives $12 per hour. He earned $9 per hour while working for Respondent. Occasionally, Petitioner will work overtime. Petitioner further testified he lifts up to 40 pounds while at work. Petitioner further testified he has not received treatment for his low back since November 28, 2016.

Petitioner testified that when walking up to a mile, he begins to get a loss of sensation to his back. After standing more than a half hour, he feels pain from the waist down to both legs. After sitting or driving more than two hours, from the waist down starts to fall asleep. When he attempts to pick up an object weighing up to 30 to 40 pounds, there is pain to the back.

Dr. Levin testified in this matter for Respondent [RX 1]. The physician testified he first evaluated Petitioner on September 2, 2015 for an independent medical examination. Dr. Levin testified he did not evaluate Petitioner for the January 2015 incident, but only the July 2015 incident. According to Dr. Levin, Petitioner reported he had a January 19, 2015 injury to the lumbar spine and that he was off for one week and then returned to full duty work [RX 1]. Petitioner further reported he did not have any injuries or treatments to the low back prior to January 2015. The physician reviewed MRIs from July 20, 2015 and September 2. 2015. An MRI was done on September 2, 2015 due to the low quality of the July 20, 2015 MRI. Dr. Levin diagnosed Petitioner with a lumbar myofascial strain from the occurrence on July 7, 2015 [RX 1]. Dr. Levin testified a full duty return to work was appropriate after 10 days post injury and 10 physical therapy sessions and an MRI were medically necessary and appropriate. This, based on the Official Disability Guidelines. The physician opined Petitioner was at maximum medical improvement, no additional treatment was necessary, and Petitioner was able to work in a full duty capacity [RX 1].

Dr. Levin testified Petitioner was re-evaluated on August 3. 2016, as it related to Petitioner's left hip and low back [RX 1]. Dr. Levin testified Petitioner began to feel pain to the left hip approximately one month after the surgery. Dr. Levin testified based on his examination, the medical records, and the MRI of the left hip, there was nothing to support Petitioner had any acute injury to this left hip following the July 7, 2015 incident or as a result of the December 28, 2015 surgery [RX 1]. Dr. Levin testified he additionally examined the Petitioner as to the low back and reviewed medical records subsequent to the initial Section 12 evaluation, and his opinions regarding the low back did not change [RX 2].

Dr. Levin provided an addendum report dated July 17, 2018, regarding the January 19, 2015 incident date [RX 2]. Dr. Levin Petitioner suffered an acute low back pain which resolved by January 26, 2015 [RX 2].

Findings/ Analysis

This case involves two separate back injury claims (1/15/15 and 7/7/2015) The Respondent and Petitioner are essentially in agreement that the 1/15/15 injury involved a mere

minor sprain/strain type injury and the Petitioner returned back to work. The findings and analysis relating to the 1/15/15 are briefly discussed below. The parties agree and stipulate that the Petitioner did suffer a work accident on 7/7/15 as he was carrying heavy metal pipes/tubes, but disagree about the extent of the injury. Respondent avers that the second injury is also a minor sprain/strain and that Petitioner has recovered from this accident. Respondent alleges that the Petitioner's condition of ill-being is largely caused by pre-existing arthritis or unrelated prior back issues. Petitioner underwent decompression back surgery with fairly good results and has returned back to employment. In evaluating this case, the Arbitratorhas examined the testimony of the witnesses and given particular attention to the medical records and divergent medical opinions of the physicians.

15WC025132 (Date of Accidental Injuries January 19. 2015)

Causal Connection: The Arbitrator concludes that the Petitioner sustained accidental injuries to his lumbar spine on January 19, 2015 and that those accidental injuries caused the temporary total disability and need for medical treatment as concluded below. The parties stipulated that Petitioner sustained accidental injuries on January 19, 2015. Prior to that date Petitioner was not receiving any medical treatment for his lumbar spine and Petitioner was working in his full-duty job as a general laborer. The medical records from Physicians Immediate Care clearly indicate that Petitioner sustained accidental injuries to his lumbar spine on January 1 9, 2015. Both Dr. Rinella and Dr. Levin agree that Petitioner sustained accidental injuries to his lumbar spine on January 19, 2015.

Medical Treatment: The Arbitrator concludes that the medical treatment received from Physicians Immediate Care was reasonable, necessary and related to the accidental injuries of January 19, 2015 and awards payment of the bills from Physicians Immediate Care to the Petitioner pursuant to Section 8(a) and Section 8.2 of the Act, if not already paid by the Respondent, as stipulated by the parties.

Temporary Total Disability (TTD): The Arbitrator concludes that Petitioner was temporarily and totally disabled from January 20, 2015, the day after the stipulated accidental injuries through January 26, 2015, the day on which Petitioner was released to return to work and to maximum

medical improvement by Physicians Immediate Care. This equates to 4/7 weeks of TTD because of the 3-day waiting period under Section 8(b) of the Act.

Permanent Partial Disability: The Arbitrator defers all conclusions relating to permanent partial disability to case 15WC025131.

Case 15WC025131 (Date of Accidental Injuries July 7, 2015)

The Arbitrator adopts and incorporates all conclusions in Case 15WC025132 as if fully set forth herein.

Causal Connection

The Arbitrator concludes that the Petitioner's current condition of ill-being is causally related to the accidental injuries of July 7, 2015. The Arbitrator concludes that the Petitioner sustained accidental injuries to his lumbar spine on January 19, 2015 and that those accidental injuries caused the temporary total disability, need for medical treatment, and permanent partial disability as concluded below. The parties stipulated that Petitioner sustained accidental injuries on July 7, 2015. Prior to that date Petitioner had continued to work for Respondent in his job as a general laborer for Respondent from at least May 1, 2015 and was not receiving any additional medical treatment for his lumbar spine since he had been released from Physicians Immediate Care, even though Petitioner continued to notice trouble with his back. However, the records from Provena Mercy Medical Center clearly indicate that Petitioner sustained accidental injuries to his lumbar spine on July 7, 2015 and the parties stipulated to accidental injuries on that date. Both Dr. Levin and Dr. Rinella agree that Petitioner sustained accidental injuries to his lumbar spine on July 7, 2015. The Arbitrator adopts the opinions of Dr. Rinella in favor of the opinions of Dr. Levin. Dr. Rinella treated the Petitioner and was aware of the Petitioner's prior accidental injuries in January 2015. Dr. Levin expressed no opinions regarding the effects of the January 2015 injuries until after he was deposed at which time he issued a report after the fact. After the stipulated accidental injuries of July 7, 2015, Petitioner shortly came under the care of Rehab Dynamix and then Dr. Rhode. When the ESI administered by Dr. Rhode was not successful, Petitioner shortly came under the care of Dr. Rinella at the recommendation of Dr. Rhode.

In reaching the conclusion that Petitioner suffered more than a sprain/strain, the Arbitrator acknowledges Respondent's arguments that Dr. Rinella testified Petitioner had arthritic disease on the September 2, 2015 MRI that had been there for years. However, the Arbitrator notes that Petitioner was able to work full duty, had no pain, and did not have any significant prior medical issues prior to January 19, 2015. The Arbitrator finds the allegation of a prior back complaint eight years prior to the work injury to be deminimus. Additionally, Petitioner was able to return back to work after the January sprain/strain and although he did have some residual pain (indicating a continued aggravation) there is sufficient objective evidence in the MRI to indicate that he acutely injured his back on July 7, 2015. The Respondent, rightly, points to medical records that show Petitioner had reported a prior injury. The Petitioner denies this under oath.

Essentially, this issue required an assessment of whether Petitioner is or can be impeached based on the medical records prepared by his physician. The Arbitrator has given consideration to this matter but finds that even if Petitioner did have some pre-existing issue, he was functional and working on the date of the accident and the reinjury. The Arbitrator does find that the Petitioner has given inconsistent statements to his medical provider but does not find this to be fatal to Petitioner's case. In so finding. the Arbitrator notes that Petitioner was 43 years old at the time of the injury and although that is not old age, there can likely be arthritis (to a lesser or greater extent) in individuals that age. Petitioner's own doctor plainly states that Petitioner had a preexisting arthritis. However, the record also shows that the Petitioner acutely injured his possibly compromised back on July 7, 2015. Under Illinois law, the pre-existing condition is not a bar to a causation finding. Neither is work injury required to be the sole or primary cause of Petitioner's current ill-being. In the Arbitrator's estimation, the pre-existing condition was not so serious or advanced so as to negate the resulting sequela that arose from the work accident.

Therefore, Dr. Rinella opinion that Petitioner's July 7, 2015 accident date was a continued aggravation is credible, logical and in keeping with Illinois law.

Medical Treatment

The Arbitrator concludes that the medical treatment received by Petitioner after the stipulated accidental injuries of July 7, 2015 was reasonable, necessary and related to the accidental injuries of July 7, 2015 and awards payment of the bills to the Petitioner pursuant to Section 8(a) and

Section 8.2 of the Act, if not already paid by the Respondent, as stipulated by the parties. This includes the treatment of: Provena Mercy Medical Center, Rehab Dynamix, Dr. Rhode, Dr. Rinella, Silver Cross Hospital and ATI Physical Therapy. The Arbitrator bases this conclusion on the conclusion relating to causal connection and the opinions of Dr. Rinella which the Arbitrator adopts in favor of the opinions of Dr. Levin for the reasons mentioned above. Dr. Levin expressed no opinion as to the reasonableness of and necessity of the medical treatment, just that it was not related to the accidental injuries of July 7, 2015.

Temporary Total Disability

The Arbitrator concludes that Petitioner was temporarily and totally disabled from July 8, 2015, the day after the stipulated accidental injuries, through November 28, 2016, the day on which Dr. Rinella released the Petitioner to return to work on a trial basis of full-duty work. This equates to 72 2/7 weeks of TTD under Section 8(b) of the Act.

Permanent Partial Disability

The Arbitrator concludes that Petitioner sustained accidental injuries that caused 25% loss of his whole person pursuant to Section 8(d)2 of the Act. Pursuant to Section 8. I b(b), five factors are to be weighed in determining the level of permanent partial disability (PPD) for accidental injuries occurring on or after September l, 2011.

With regard to subsection (i) of Section 8. 1b(b), the Arbitrator notes that neither party submitted an AMA impairment report. Therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of Section 8. 1 b(b), the occupation of the employee, the Arbitrator notes that the Petitioner was employed as general laborer. The Arbitrator concludes that the Petitioner's occupation required him to lift and carry heavy objects weighing as much as 80 pounds. The Arbitrator finds this to be heavy work, at least on an occasional basis. The Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of Section 8. 1b(b), the Arbitrator notes that Petitioner was 44 years old at the time of the accidental injuries. Because of his age, Petitioner has to live with the permanent partial disability until his life expectancy and work-life expectancy expire, which

is greater than for an older individual. The Arbitrator considers Petitioner to be a younger individual. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of Section 8. 1 b(b). Petitioner's future earnings capacity. the Arbitrator notes that Petitioner has returned to work as a general laborer. Based on some lingering pain issues with long term walking or heavy lifting, the Arbitrator notes that the lifting limitations could likely limit his future earning capacity as it may limit the type of employment he can accept. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (v) of Section 8. 1 b(b), evidence of disability corroborated by the treating medical records. the Arbitrator notes the Petitioner's credible complaints are corroborated by the medical records of Dr. Rinella. The Petitioner underwent laminectomies, facetectomies and foraminotomies at L4, L5 and Sl, FCE placed Petitioner at the medium lifting level. The Arbitrator therefore gives greater weight to this factor.

The determination of PPD is not simply a calculation but an evaluation of the five factors in Section 8. lb(b). In making this evaluation of PPD, no single enumerated factor is the sole determinant of PPD. Therefore, after applying Section 8. I b(b), and considering the relevance and weight of each of the five factors, the Arbitrator concludes that as result of the accidental injuries, Petitioner has sustained 25 % loss of use of his whole person under Section 8(d)2

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alejandro Perez,

Petitioner,

vs.

No. 15 WC 25132 consolidated w/
15 WC 25131

Labor Temps, Inc.,

Respondent.

21IWCC0018

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent Labor Temps, Inc. ("Labor Temps") herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, number of dependents, benefit rates, temporary disability and permanent disability, and being advised of the facts and law, vacates the Amended Arbitration Decision and remands this case to the Arbitrator for further proceedings consistent with the issues stated below, and for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission,* 78 Ill.2d 327 (1980).

The Petition for Review in this matter, and the associated issues, has brought to light numerous defects in the arbitration process requiring a remand to clarify the record below. In so remanding, the Commission highlights various procedural and substantive facts presented in these claims.

On July 17, 2015, Petitioner, a 43-year-old laborer, filed two Applications for Adjustment of Claim alleging that he sustained lumbar injuries in separate work accidents first on January 19, 2015 (Claim No. 15 WC 25131) and later on July 7, 2015 (Claim No. 15 WC 25132). In those Applications, Petitioner named only one Respondent, Labor Temps, as his employer. He also alleged that at the time of his accidents, he was single and had three dependent children under age 18.

On September 21, 2015, Petitioner filed an Amended Application for Adjustment of Claim in each case in which he named an additional employer. In 15 WC 25131, Petitioner added Respondent, Innovative Plastech; and in 15 WC 25132, Petitioner added Respondent, VIM Recyclers ("VIM Recyclers"). In each Amended Application, Petitioner again alleged that he was single, with three dependent children under age 18 at the time of his accidents.

Thereafter, Petitioner filed a Motion to Consolidate both claims on September 13, 2016, which does not reveal notice of the motion was provided to either Innovative Plastech or VIM Recyclers. Petitioner's claims were consolidated by order of an Arbitrator on November 4, 2016.

On August 16, 2018, both of Petitioner's claims naming both Labor Temps, Innovative Plastech and VIM Recyclers proceeded to a hearing before Arbitrator Steffen. At that hearing, two Request for Hearing forms were completed, one for each claim number. However, in each, only Labor Temps was listed as the named Respondent. Petitioner and Labor Temps, through their attorneys, signed the Request for Hearing forms in which they stipulated, for both alleged accidents, that Petitioner's average weekly wage was $360.00 and that he was single with no dependent children under the age of 18. No mention was made of the second named employers and Respondents, Innovative Plastech and VIM Recyclers, on either Request for Hearing form. The transcript reveals that neither Innovative Plastech nor VIM Recyclers appeared at the arbitration hearing. The Commission cannot determine from the record below whether Innovative Plastech or VIM Recyclers were provided with notice of the hearing on the consolidated claims.

On November 29, 2018, Arbitrator Steffen issued two decisions, one for each claim number. However, as with the Request for Hearing forms, the second named employers and Respondents, Innovative Plastech and VIM Recyclers, were not included in the caption of either decision. The Arbitrator found that Petitioner was single and had no dependent children under age 18 at the time of either accident. The Arbitration decisions issued by the Commission only provided notice to counsel for Petitioner and Labor Temps.

Thereafter, both parties filed Motions to Correct Clerical Errors pursuant to §19(f) of the Act with an Arbitrator to whom the cases were subsequently assigned. The motions failed to show notice to Innovative Plastech or VIM Recyclers. Petitioner's Motion alleged that, as of August 7, 2015, Petitioner was married and had three children, and the motion included documentation supporting Petitioner's claimed dependents. Petitioner requested, in his motion, that the Arbitrator's decisions be corrected to reflect that he had four (4) dependents at the time of his accidents, and that his temporary total disability rate and permanent partial disability rate for each accident should be corrected to reflect the statutory minimum rate of $330.00.

Labor Temps filed a response to Petitioner's motion on January 19, 2019. In it, Labor Temps claimed that the parties had stipulated at arbitration that Petitioner was single with no dependent children, that Petitioner presented no evidence at the hearing to show that he was married with children, and that his motion should be denied because it sought to address a

substantive, not clerical, issue. Labor Temps' response to Petitioner's motion also fails to show notice to Innovative Plastech or VIM Recyclers.

On March 1, 2019, Arbitrator Soto, who heard the parties' §19(f) motions, entered an order granting Petitioner's motion. Arbitrator Soto also issued Amended Arbitration Decisions, in which he found that, at the times in question, Petitioner was single with three dependent children. These Amended Decisions purportedly corrected the original decisions issued by Arbitrator Steffen in both case numbers, but also failed to include the second named employer and Respondent in each case, Innovative Plastech and VIM Recyclers, in the respective captions of each decision. Arbitrator Soto found that the number of dependents found by Arbitrator Steffen in her original Arbitration Decisions was a "scrivener's error," because, "Respondent was aware, based upon the Application for Adjustment of Claims, that Petitioner had 3 children or dependents." As with the original decisions, the Amended Arbitration Decisions issued by the Commission only provided notice to counsel for Petitioner and Labor Temps.

Labor Temps timely filed its Petition for Review related to this claim, and in the consolidated case, on May 8, 2019. Notice was not provided to Innovative Plastech or VIM Recyclers. Neither Innovative Plastech nor VIM Recyclers appeared at oral arguments or, took part in the petitions for review.

The Commission, during its *de novo* review, has evaluated the record below. It is clear that the consolidation of Petitioner's claims, the arbitration hearing, the Section 19(f) motion, all of the arbitration decisions, the petitions for review, and the briefs have proceeded as to two Respondents, but without proper notice to or inclusion of all parties. The Amended Application for Adjustment of Claim filed by Petitioner on September 21, 2015 in case number 15 WC 25131 reflects notice was sent to Labor Temps, Innovative Plastech and an adjuster for Gallagher Bassett Services. In case number 15 WC 25132, the Amended Application was sent to Labor Temps, VIM Recyclers and an insurance adjuster from Gallagher Bassett Services. Counsel for Petitioner and Labor Temps appeared at oral arguments and confirmed that the Commission's records are accurate indicating two consolidated claims amended by Petitioner to include two Respondents, a lending and borrowing employer, who are purportedly jointly and severally liable if Petitioner were to prevail. It is evident from the proceedings below that counsel for Petitioner and Labor Temps proceeded as though the alleged employers were correct and that the claims had been properly consolidated. It is equally evident that the Commission issued all four arbitration decisions to Petitioner and only one Respondent, Labor Temps, despite Amended Applications for Adjustment of Claim on file which reflect other Respondents, Innovative Plastech and VIM Recyclers.

In the absence of evidence establishing that all of the proceedings as of the time that Innovative Plastech and VIM Recyclers were added as Respondents in these claims were properly held with notice to those Respondents, the Commission finds it necessary to vacate the Amended Arbitration Decisions and remand the cases for a new hearing with proper notice to all proper

parties. For these reasons, the Commission vacates the Amended Arbitration Decision and remands this case back to the Arbitrator for such determinations.

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

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

DATED: JAN 12 2021
o-11/19/2020
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

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

Alfonso Stabolito,

Petitioner,

vs. No. 16 WC 25455

City of Chicago,

21IWCC0019

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 Temporary Disability and Permanent Disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 28, 2018, is hereby affirmed and adopted.

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

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

21IWCC0019

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: JAN 13 2021
o-01/07/21
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

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

STABOLITO, ALFONSO
Employee/Petitioner

Case# **16WC025455**

CITY OF CHICAGO
Employer/Respondent

21IWCC0019

On 5/7/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0154 KROL BONGIORNO & GIVEN LTD
CHARLES GIVEN
20 S CLARK ST SUITE 1820
CHICAGO, IL 60603

0010 CITY OF CHICAGO DEPT OF LAW
LUCY HUANG
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

21IWCC0019

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

Alfonso Stabolito
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **16** WC **25455**

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 **Brian T. Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **February 27, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 1, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**81,712.38**; the average weekly wage was $**1,571.39**.

On the date of accident, Petitioner was **41** 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 paid $**71,236.12** in TTD benefits and $**61,359.45** in maintenance benefits, for a total credit of $**132,595.57**. Respondent did not pay any TPD benefits, non-occupational indemnity benefits or other benefits under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**1,047.59**/week for **68** weeks, commencing **August 2, 2016** through **November 20, 2017**, in accordance with Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $**1,047.59**/week for **65-3/7** weeks, commencing **November 21, 2017** through **February 21, 2019**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing **February 28, 2019**, of $**792.40**/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

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

Signature of Arbitrator

5/7/2019
Date

MAY 7 - 2019

56STATE OF ILLINOIS)
)
COUNTY OF COOK)

21IWCC0019

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Alfonso Stabolito
Employee/Petitioner

v. Case # **16 WC 25455**

City of Chicago
Employer/Respondent

Findings of Fact:

The Parties stipulated that on August 1, 2016, Alfonso Stabolito (hereinafter referred to as "Petitioner"), sustained an accident that arose out of and in the course of his employment by the City of Chicago (hereinafter referred to as "Respondent"). Petitioner's job title was Concrete Laborer-Cement Mixer for the Department of Transportation.

On April 24, 2018, Arbitrator Cronin heard this case pursuant to Section 19(b) of the Act. In the Decision dated June 28, 2018, he awarded TTD and Maintenance benefits, unpaid medical bills, a bill from Vocamotive, and vocational rehabilitation. (Px.1) Neither Party filed a Review of the Decision.

For the February 27, 2019 trial on permanency, the only issues in dispute are whether Petitioner is entitled to maintenance benefits for the period commencing January 5, 2019 through February 27, 2019, and the nature and extent of Petitioner's injury.

The record reflects that on July 5, 2018, Petitioner was examined by Dr. Jeremy Patel at Rush University Internists. This clinic acts as Petitioner's primary care physician. Petitioner complained of pain in his left shoulder and cervical spine with radicular symptoms radiating to his left shoulder. Petitioner advised Dr. Patel that recreational use of marijuana while he was on vacation in Colorado provided relief of his symptoms. Dr. Patel referred Petitioner to Palliative Care to discuss prescription marijuana (Px.4)

Petitioner attended his initial post-Award vocational meeting at with Ms. Kari Stafseth at Vocamotive on August 15, 2018. (Px.10; Rx. 1)

On August 29, 2018, Petitioner was re-examined by Dr. Kern Singh of Midwest Orthopaedics at Rush. Dr. Singh prescribed a CT scan and MRI of the cervical spine. Petitioner's permanent restrictions were not changed.

On September 10, 2018, Petitioner completed a request for time off for an MRI appointment. (Rx.2 p. 3) Petitioner underwent the diagnostic testing on September 10, 2018. The tests revealed Petitioner was status post ACDF at C4-5 with a solid fusion. He had mild central disk protrusion at C3-4 and C5-7 (Px.3; Rx.6)

On September 11, 2018, preparation was completed for first day of the Job Search Workshop. Petitioner arrived on time for the Workshop and was observed to be casually dressed wearing jeans, tennis shoes, and a hoodie. Petitioner was also observed to be wearing sunglasses upon entering the classroom and during the Workshop. He was asked to remove his sunglasses but declined and reported that the light hurt his eyes. (Rx.2, pp. 1-2) Petitioner was observed to slouch in his chair to the point where it looked like he was sleeping or could fall asleep. He was asked to sit up in his seat and stated that he was comfortable seated as he was. (Rx.2, p. 2) Throughout the morning portion of the Workshop (8:45a.m. to 12:00 p.m.), Petitioner wore his sunglasses and slouched in his chair. At approximately 11:45 am, Petitioner was visually confirmed to be asleep. An attempt was made to wake him up, but he did not respond. After returning from lunch, Petitioner had his sunglasses off but continued to slouch in his chair. When checking his work, Petitioner was "behind in activities and needed to be prompted to provide more information." (Rx.2, p. 2; Px.10) Petitioner was "unengaged throughout the Workshop and seemed to be unable to focus." (Rx.2, p. 2)

Petitioner completed requests for time off for a September 13, 2018 doctor's appointment and a September 19, 2018 pain clinic appointment. (Rx.2, p. 2)

On September 12, 2018, Vocamotive phoned Petitioner to ascertain his keyboarding scores and curriculum progress. A voicemail was left requesting a return phone call. Petitioner did not call back to report his progress.

On September 14, 2018, Petitioner phoned Vocamotive and reported that he would be unable to attend his scheduled computer lab class because he "barely got any sleep last night." (Rx.2, p. 3) Petitioner was advised to call back later that day to report his keyboarding scores and curriculum progress. Vocamotive phoned Petitioner and left a voice message requesting a return phone call. Again, Petitioner did not call back to report his progress. (Rx.2, p. 3)

On September 18, 2018, Petitioner attended the second day of the Job Search Workshop. Petitioner was observed to wear khaki colored jeans and a plaid button-down shirt with black tennis shoes. Petitioner was observed to take 3-4 long breaks (one break was approximately 20 minutes long) during the morning (from 8:45 - noon) without asking to leave. Petitioner reported he was having difficulty concentrating in the Workshop. It was noted that Petitioner "fell far behind when completing independent work." (Rx.2, p. 4) When the remainder of the Workshop participants were halfway done with their resume' worksheet template, Petitioner had only typed in his contact information and basic job details (Rx.2, p. 2) When his resume' worksheet was checked again approximately 10 minute later, the only progress shown was that he typed one sentence. (Rx.2, p. 4) Petitioner was instructed to obtain any missing contact information for personal and professional references for homework by the next Job Search Workshop (September 25, 2018). (Rx.2, p. 3)

On September 19, 2018, Petitioner phoned Vocamotive and reported that his daughter had come home sick from school that day. He asked to reschedule his computer lab class from September 20 to September 21, 2018. (Rx.2 p. 4)

On September 21, 2018, Petitioner attended computer lab class. It was noted that Petitioner was using his cell phone in the computer lab. He was counseled on this. (Rx.2, p. 5)

On September 25, 2018, Petitioner attended the final Job Search Workshop. Petitioner was observed to wear similar clothing to the second Workshop, which included a button-down plaid shirt and khaki colored pants. Petitioner reported that he did not have anyone to list as references. Petitioner was advised that he could use the Vocamotive staff as professional references if necessary. Petitioner was informed that the professional references he used could be a past supervisor or a teacher. Petitioner reported that he had worked for several supervisors from the City of Chicago.

On September 19, 2018, Petitioner was re-examined by Dr. Singh. Dr. Singh reviewed the CT scan and MRI films and opined Petitioner was not a candidate for additional surgery. He released Petitioner at maximum medical improvement with no change in his permanent work restrictions and advised him to follow up with his primary care physician for pain management and medication. (Px.4)

Petitioner attended an appointment with Dr. Sean O'Mahony at Rush University Internists on September 19, 2018. Dr. O'Mahony was the palliative care physician to whom Dr. Patel referred him. Dr. O'Mahony noted that Petitioner did not receive pain relief with Naproxen, Norco, Gabapentin or Cymbalta but experienced some pain relief with recreational marijuana. Dr. O'Mahony concluded that Petitioner was a candidate for medical marijuana. He advised Petitioner that he was not to drive when using marijuana. (Px.4)

On October 3, 2018, Petitioner attended compute lab class. It was noted that Petitioner had to be awoken several times throughout his computer lab appointment. (Rx.2, p. 8)

Petitioner completed a time off request for a doctor's appointment on October 4, 2018 (Rx.2, p. 8)

On October 4, 2018, Petitioner was re-examined by Dr. Patel at Rush University Internists. While brushing his teeth, Petitioner had severe pain in his neck, upper back and shoulder that radiated down the left arm. Petitioner had no relief from the Neurontin previously prescribed. He had swelling in his eyes and a rash after starting Sertraline. He discontinued these medications. Dr. Patel prescribed Lyrica and a Medrol Dosepak. On October 11, 2018, Dr. Patel referred Petitioner back to Dr. O'Mahony for additional consideration of the medical marijuana prescription.

On the same day, Vocamotive phoned Petitioner to ascertain his keyboarding scores and curriculum progress for this date. Petitioner did not call back to report his progress. (Rx.2, p. 9)

On October 5, 2018, Petitioner reported that he had not worked on Word 2016 Basic,

Section 1 curriculum, but that he would work on it later. Petitioner reported he was "not feeling well." (Rx.2, p. 9)

Petitioner completed a time off request and reported that he had Jury Duty on November 1, 2018.

In the Vocational Progress Report dated October 11, 2018, Ms. Stafseth stated, "[Petitioner] is observed to slouch in his chair and periodically fall asleep during appointments." (Rx.2, p.10) Ms. Stafseth further stated, "[Petitioner is behind schedule in his computer curriculum and has been scheduled for one-on-one assistance in order to catch up." (Rx.2, p. 10)

On October 15, 2018, Petitioner arrived on time for his appointment at the Hegewisch Branch, Chicago Library. At that appointment, it was noted that Petitioner asked to take 3 breaks in order to take a walk and stretch. It was noted that Petitioner nearly fell asleep twice during his appointment and had to be spoken to in order to stay on task. (Rx.3, p. 2)

Dr. Jeremy Patel authored a medical note dated October 11, 2018 was received in which he advised Petitioner might need to leave class early or be excused completely. (Rx.3, p. 2)

On October 12, 2018, Petitioner filed a 19(b)/8(a) request for hearing and set it on Arbitrator Cronin's November 15, 2018 status call. In such motion, Petitioner claimed that his condition has deteriorated to the extent that he now requires additional medical treatment, but that Respondent has refused to authorize such treatment. (Px.5)

On October 16, 2018, Petitioner requested to reschedule his video call appointment because he needed to attend a meeting at his son's school. (Rx.3, p. 2)

On October 24, 2018, Petitioner called and reported that he was unable to work on the curriculum on that day. He reported, "I had to deal with an attack." Petitioner did not offer further explanation. (Rx.3, p. 3)

On October 25, 2018, Petitioner called and reported that he was unable to attend computer lab class due to pain. (Rx.3, p. 3) Petitioner was advised to work remotely. Vocamotive phoned Petitioner to ascertain his daily keyboarding scores. Petitioner reported that he was unable to work on keyboarding and curriculum due to sleeping all day. (Rx.3, p. 3) Petitioner also reported that he had not worked on the curriculum. (Rx.3, p. 4)

On November 1, 2018, Petitioner attended computer lab class and he left the computer lab at approximately 1:30 p.m. to pick up his children. (Rx.3, p. 4)

Petitioner submitted 4 requests for time off for the following dates: November 8, 2018 and November 21, 2018 for doctor's appointments, November 13, 2018 for a dentist's appointment, and November 26, 2018 for a court appearance.

On November 2, 2018, a call was placed to Petitioner to record his scores and progress. Petitioner reported that he had been out all day and had not yet started his work. He reported he

would work on it later that day and would leave a voice message as to the work he completed. Petitioner called back on the same day and reported that he keyboarded at 5 words per minute and at 43 keystrokes per minutes. He did not report any curriculum progress.

On November 5, 2018, Vocamotive phoned Petitioner to ascertain his scores and progress. Petitioner called and reported that he did not have work to report and stated that he would work on his curriculum and would leave a voice message when he had finished.

On November 6, 2018, Petitioner was observed wearing jeans and sunglasses in computer lab class. (Rx.3, p. 5)

On November 20, 2018, Petitioner submitted a request for time off for a doctor's appointment for his daughter.

A Vocational Analysis that was created at the end of November 19, 2018 indicated that Petitioner had "several missed several appointments due to court appointments, appointments for his children, and his own medical appointments." (Rx.3, p. 7)

In an email message dated November 28, 2018, Petitioner's Counsel wrote: "This case is set for 11/29/18. I assume you never heard back from COF about authorization for the medical treatment recommended? Please confirm." (Px.5)

On November 29, 2018, Petitioner called and stated that he would not be attending computer lab class on that date due to illness. He reported he would come in on November 30, 2018 if he were feeling better. (Rx.3, p. 1)

On November 30, 2018, Petitioner called and reported that he was still ill and would not be attending computer lab class on this date. He was advised he needed to complete the assignment, and a video call was scheduled. Petitioner called back on the same day and reported that he would not be able to complete the assignment, and he would need more time to study. He reported he was "out" getting his daughter medicine. (Rx.4, p. 2)

On December 7, 2018, Petitioner called and reported that he was not able to complete the required assignment because he had been "running errands all day" with his mom and his aunt that day. On December 10, 2018, Vocamotive phoned Petitioner to ascertain his progress. Once again, Petitioner stated he did not get any work done on that date. (Rx.4, pp.3-4)

On December 12, 2018, Petitioner called and reported that he was at the hospital secondary to having to take his grandmother to the emergency room. (Rx.4, p. 4)

On December 13, 2018, Petitioner called and stated that he would be unable to attend computer lab class because there was an "incident" involving his daughter at school.

On December 14, 2018, Petitioner called and reported that he had Court on that date. He stated that he did not complete any work for that day. (Rx.4, p. 5)

On December 19, 2018, Vocamotive phoned Petitioner to ascertain his progress. Petitioner reported that he would work on the assignment later that day. He also reported that he was ill and was unsure if he were going to attend computer lab class on December 20, 2018. (Rx.4, p. 5)

On December 20, 2018, Petitioner reported that he was not going to attend computer lab class that day due to illness. (Rx.4, p. 5)

A Vocational Analysis that was created on January 3, 2019 stated: "[Petitioner] would have completed the curriculum on November 16, 2018 and is now 48 days behind schedule." (Rx. 4 p. 7) Ms. Stafseth further stated: "As can be seen from the report, he does not always report his daily activities when working remotely." (Rx.4, p. 7)

On January 7, 2019, a call was placed to Petitioner to arrange for extra days in the computer lab to catch up on his curriculum. Petitioner reported that he would be unable to attend computer lab class an additional day that week. He reported he "had things he needed to take care of with his daughter, mother, and grandmother." (Rx.5, p. 1)

On January 8, 2019, Petitioner presented Ms. Stafseth with the job offer as a Sound Engineer with his cousin's husband's company. The position was located in Griffith, Indiana and paid $8.25 per hour. Petitioner reported that he found an online training program for that job that cost about $1,500.00. He reported that with completion of such program, he would make $10.00 per hour at the studio. Ms. Stafseth advised that she could not propose the program as she believed that he could make $10.00 per hour elsewhere without the training. Petitioner reported that "the only other job that would make him happy was in a studio." (Px.5, p. 2) Petitioner was advised that this line of work was still on the table; however, the training could not be recommended given her opinion that he could make similar money without the training. (Rx.5, p. 2)

On January 9, 2019, Ms. Stafseth contacted Petitioner's attorney with regard to Petitioner "being behind schedule in the computer training, missing appointments at Vocamotive, and not calling in/or back during regular business hours." (Rx.5, p. 3)

Petitioner completed a request for time off for a January 17, 2019 Court date (not related to his workers' compensation claim). (Rx.5, p. 3)

Due to Petitioner's alleged non-compliance with vocational rehabilitation, Respondent sent a suspension letter to Petitioner dated January 15, 2019. Such letter stated that his benefits were going to be suspended due to non-compliance with vocational services. It was noted that the decision would be reconsidered if he provided proof within 10 days. (Rx.5, p. 4; Rx.8)

After receiving the suspension letter, Petitioner did not provide any proof to Respondent for reconsideration.

At the February 27, 2019 trial on permanency, Petitioner testified that he previously testified on April 24, 2018 regarding an accident of August 1, 2016. Since April 24, 2018, he

has received more treatment and has undergone vocational rehabilitation. Dr. Jeremy Patel rendered palliative care to him, which included a prescription for medical cannabis for the chronic pain in his neck and right shoulder. Petitioner sought additional treatment on August 29, 2018 with Dr. Kern Singh, who ordered a CT and an MRI of his cervical spine. Subsequently, Dr. Singh released him to return to work with the same restrictions. Petitioner then saw Dr. Sean O'Mahony, who also prescribed medical cannabis. Petitioner testified that he did not fill this prescription because he did not want it to interfere with his benefits, which included vocational rehabilitation with Vocamotive. Lyrica had been prescribed to him, but it caused too many side effects, such as dizziness and itchiness.

Petitioner testified that on October 11, 2018, Dr. Jeremy Patel again prescribed medical cannabis. However, Petitioner did not take it. Petitioner testified that he discontinued the pain medications because of dizziness, itchiness, stomach issues, and sharp pains. Petitioner testified that he thought these meds were getting in the way of the vocational rehabilitation because they caused sensitive eyes, which affected his computer work.

On October 28, 2018, when Respondent met with him, they did not offer him a job within his restrictions.

Petitioner testified that Vocamotive gave him guidelines regarding the desired attire. He did not have this type of clothing because he had not received some of the benefits. Once he received the benefits, he was able to get the clothing. Petitioner testified that the medication affected him, which is the reason he fell asleep at Vocamotive. Petitioner testified that he still has not been able to get good sleep.

Petitioner testified that he conducted an independent job search. Through February 27, 2019, he searched for jobs in positions such as cashier, usher, and security guard. He received no interviews and no job offers. He used an application on his PC that charted prospective employers within a mile radius. He looked in the Sunday newspaper and visited businesses. He also networked with his friends and family. Petitioner identified Px.9 as his job search records since Vocamotive terminated their services. Petitioner elected to decline additional vocational rehabilitation services because he just wanted to put this all behind him. Petitioner testified that he has learned some skills and feels capable of earning $10.00 - $13.00 an hour.

Petitioner testified that he is a Chicago resident. His cousin's husband has a sound studio in Griffith, Indiana. He could earn $8.25/hour working in this studio. He would turn knobs and lift microphones. He declined this job based on his conversation with Ms. Kari Stafseth at Vocamotive.

Petitioner testified that he is a member of Local 1001 of the Concrete Laborers. The wage scale indicates that from July 1, 2018 through June 30, 2019, he would be earning $42.72/hour. (Px.8)

Presently, Petitioner testified, his whole life has changed because of the injuries to his cervical spine and left shoulder. He does not try to play or wrestle with his children because it causes pain. He does not go on rides at amusement parks for the same reason. He does not try

to lift a gallon of milk. Petitioner testified that he experiences symptoms from his neck to his shoulder and down to his fingertips. It's a constant pain and a constant numbness. He gets shooting pains - - like an electric shock - - even when he is not doing anything. He has a difficult time washing dishes, doing laundry, and getting in the shower. When he prepares food, he has to go very slowly. He rents an apartment, so his is not responsible for doing the outdoor work. Petitioner testified that he takes care of his son, 11, and his daughter, 14. Petitioner has not scheduled any doctor's appointments. He takes steaming hot showers, places a warming pad around his neck, and applies patches. Sometimes he does not fall asleep until 2:00 – 3:00 in the morning. He has difficulty falling asleep at night because he is very uncomfortable. He probably gets only 4 hours of sleep a night.

On cross-examination, Petitioner testified that he has treated with Dr. Singh. Petitioner's understanding was that Dr. Singh told him that he was at MMI. Dr. Singh only told him to see his PCP for pain. When he participated in the vocational rehabilitation process, he understood that when he got to a certain point, he was to make 40-60 contacts with prospective employers. Petitioner testified that he understood that he was to receive maintenance benefits while undergoing vocational rehabilitation and that he was to treat vocational rehabilitation as a full-time job.

On redirect examination, Petitioner testified that he did not actually enter the job search process until benefits were terminated. So, he did not have all of that training.

On behalf of Respondent, Ms. Kari Stafseth testified on February 27, 2019. Ms. Stafseth testified that her employer is Vocamotive and that she has been a Certified Rehabilitation Counselor since 2009. On February 2, 2018, she recommended that Petitioner participate in a vocational rehabilitation program. Ms. Stafseth authored 5 reports. (Rx.1 – Rx.5) She acknowledged that Petitioner missed several appointments, that he was 48 days behind in his computer training, and that he was not calling back to report his progress.

On cross-examination, Ms. Stafseth testified as to the results of the vocational testing that Petitioner underwent. She testified that his job targets included front desk clerk, security guard, and customer service representative. Ms. Stafseth acknowledged that Petitioner could not return to work as a Concrete Laborer. She testified that Petitioner put forth an acceptable effort in vocational rehabilitation. She did not find that Petitioner was non-compliant with the vocational rehabilitation program. She did not recommend that Vocamotive's vocational rehabilitation services be discontinued. Ms. Stafseth declined Petitioner's request to accept the sound engineering position at $8.25/hour. She believed that he could earn at least $10.00/hour with another prospective employer without the expense of a sound engineer training program. As far as she knew, Respondent did not offer Petitioner alternative employment.

On redirect examination, Ms. Stafseth testified that in her professional opinion, with regard to Petitioner's behavior during his sessions with Vocamotive, she did not think that such behavior would affect his employability.

Px.9 is a compilation of Petitioner's job search contacts from January 20, 2019 through February 21, 2019. Net of duplicates, the documents show that he made 64 contacts.

Conclusions of Law:

In support of his decision regarding issue (K) "What temporary benefits are in dispute? Maintenance," the Arbitrator finds as follows:

Arbitrator's Exhibit #1, the Request for Hearing, indicates that the disputed period of maintenance is from January 5, 2019 through February 27, 2019. (Ax.1, Section 8) Respondent is bound their stipulations in the Request for Hearing. Please see *Walker v. Indus. Comm'n*, 345 Ill.App.3d 1084 (4th Dist. 2004)

Due to Petitioner's alleged non-compliance with vocational rehabilitation, Respondent sent a suspension letter dated January 15, 2019 to Petitioner. Such letter stated that his benefits were going to be suspended due to non-compliance with vocational services. It was noted that the decision would be reconsidered in 10 days if proof was provided. (Rx.5, p. 4; Rx.8)

Ms. Stafseth testified that Petitioner put forth an acceptable effort in vocational rehabilitation. She did not find that Petitioner was non-compliant with the vocational rehabilitation program.

No vocational expert opinion was provided to rebut Ms. Stafseth's opinions.

Although Petitioner testified that he continued his job search right up to the date of trial, his documented, self-directed job search shows that he made contact with prospective employers from January 20, 2019 through February 21, 2019. (Px.9)

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

"The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is unable to be self-sufficient the employer shall further pay for such maintenance or institutional care as shall be required *** The maintenance benefit shall not be less than the temporary total disability rate determined for the employee."

The Arbitrator notes that Section 8(a) requires the employer to pay only those maintenance costs and expenses that are incidental to rehabilitation. That means that an employer is obligated to pay maintenance benefits only "while a claimant is engaged in a prescribed vocational rehabilitation program." *W.B. Olson, Inc. v. Illinois Workers' Comp. Comm'n*, 981 N.E.2d 25, 366 Ill. Dec. 960 (1st Dist. 2012)

The Arbitrator notes that the Appellate Court has construed the statutory term "rehabilitation" broadly to include an injured employee's self-initiated and self-directed job search. Please see *Roper Contracting v. Indus. Comm'n*, 812 N.E.2d 65, 285 Ill. Dec. 476 (5th Dist. 2004) If a claimant is not engaged in some type of "rehabilitation" (i.e., physical rehabilitation, formal job training, or self-directed job search), the employer's obligation to

provide maintenance is not triggered.

Based on the foregoing, the Arbitrator finds that Petitioner is entitled to maintenance benefits from January 5, 2019 through February 21, 2019.

In support of his decision regarding issue (L) "What is the nature and extent of the injury?" the Arbitrator finds as follows:

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Petitioner reached MMI for the undisputed cervical and left shoulder condition on November 20, 2017 when he was discharged by Dr. Cole within the restrictions set forth by Dr. Singh. Petitioner is unable to return to work as a Concrete Laborer and is requesting consideration of a wage differential award. Having considered all of the evidence, the Arbitrator concludes Petitioner has proven by a preponderance of the evidence that he is entitled to a wage differential award under Section 8(d)1 of the Act. In so finding, the Arbitrator relies on the vocational opinions of Ms. Stafseth.

The Arbitrator notes that Ms. Stafseth testified as Petitioner's witness in the 19(b)/8(a) hearing but testified as Respondent's witness in this permanency hearing.

To qualify for a wage differential under Section 8(d)1 of the Act, a claimant must prove (1) partial incapacity which prevents him from pursuing his "usual and customary line of employment" and (2) an impairment of earnings. In order to prove an impairment of earnings, a claimant must prove his actual earnings for a substantial period before the accident and after he returns to work, or in the event that he has not returned to work, he must prove what he is able to earn in some suitable employment. See *Gallianetti v. Indus. Comm'n*, 315 Ill. App. 3d 721, 730 (3rd Dist. 2000). The statutory language of the Act is clear that the IWCC must determine the "average amount which the claimant is able to earn in some suitable employment or business after the accident." If the claimant is not working at the time of the calculation, the IWCC must rely on functional capacity and vocational expert evidence. *Id.*

Prior to the accident, Petitioner worked as a Concrete Laborer-Cement Mixer in the Department of Transportation. The position is through Local Union 1001. The trial testimony and documentary evidence show that Petitioner is unable to return to work in his previous position due to the injuries. Respondent was unable to accommodate the restrictions. The vocational evidence demonstrates Petitioner is capable of finding employment within his permanent work restrictions with a valid job search effort. Ms. Stafseth found Petitioner would likely earn an average hourly wage between $10.00 and $13.00 per hour. The current minimum wage in the City of Chicago is $12.00 per hour. Potential job targets include Front Desk Clerk, Cashier, Security Guard, Service Dispatcher, and Customer Service Representative.

In *Crittenden v. Illinois Workers' Comp. Comm'n*, 2017 IL App.(1st) 160002WC, the Appellate Court held that the Commission must identify, based on the evidence in the record, an occupation that the claimant is able and qualified to perform, and apply the average wage for the occupation to the wage differential calculation.

The Arbitrator finds Petitioner is "able and qualified" to perform work in the potential job targets identified by Ms. Stafseth that include Front Desk Clerk, Cashier, Security Guard, Service Dispatcher, and Customer Service Representative. The Arbitrator finds he is capable of earning $13.00 per hour at the present time. Given his test results on spatial relations and the MN Daily, as well as the demeanor and intelligence he exhibited at trial, the Arbitrator finds it reasonable to select the highest paying job (in the range) for which he is qualified. The record shows that if Petitioner had returned to work for Respondent as a Concrete Laborer-Cement Mixer, he would be earning $42.72 per hour. (Px.8)

Section 8(d)1 of the Act provides that the Petitioner:

"shall … receive compensation … 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 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." 820 ILCS 305/8(d)1.

Thus, the Arbitrator finds Petitioner's wage differential benefits under Section 8(d)1 are to be calculated as follows:

($42.72/hr. - $13.00/hr.) * (66-2/3%) = ($19.81/hr.) * (40 hrs./week) = $792.40/week

Additionally, the Arbitrator finds the Petitioner was 41 years old at the time of August 1, 2016 accident (based on his date of birth, August 29, 1974). As such, the award for wage differential benefits shall be effective through Petitioner's 67th birthday (if living). The wage differential benefits will begin on February 28, 2019.

5-7-19

Brian T. Cronin
Arbitrator

Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Harriett Kemp,
Petitioner,

vs. No: 16 WC 006976

City of Chicago,
Respondent.

21IWCC0020

DECISION AND OPINION ON REVIEW

Petition for Review having been timely filed by Respondent herein and notice given to all parties, the Commission, after considering Petitioner's Motion to Dismiss Respondent's Review and the issue of nature and extent, and being advised of the facts and law, denies Petitioner's Motion to Dismiss and affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

MOTION TO DISMISS REVIEW

On May 18, 2020, Petitioner filed a Motion to Dismiss Respondent's Petition for Review, alleging Respondent failed to file its Petition for Review within 30 days of receipt of the Arbitrator's Decision. The Arbitrator's original Decision was received by the parties on April 6, 2020. Subsequently, a corrected Decision was filed and received via email by the Respondent on April 13, 2020. Respondent's Petition for Review of that Decision was timely filed on May 12, 2020. 820 ILCS 305/ 19(f); 820 ILCS 305/19.1. Therefore, Petitioner's Motion to Dismiss is denied.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Motion to Dismiss Respondent's Petition for Review is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 3, 2020, is hereby affirmed and adopted.

21IWCC0020

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

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

Pursuant to 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 to secure payment of the award. Therefore, 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: JAN 13 2021

Marc Parker

Barbara N. Flores

Deborah L. Simpson

mp/dk
0-1/7/21
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KEMP, HARRIETT
Employee/Petitioner

Case# **16WC006976**

CITY OF CHICAGO
Employer/Respondent

21IWCC0020

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:

0314 KUMLIN & FROMM LTD
MARK L FROMM
205 W RANDOLPH ST SUITE 1030
CHICAGO, IL 60606

0010 CITY OF CHICAGO
MATTHEW LOCKE
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

21IWCC0020

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

HARRIETT KEMP
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **16** WC **06976**

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **October 22, 2019**. By stipulation, the parties agree:

On the date of accident, **December 21, 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 $**72,278.44**, and the average weekly wage was $**1,389.97**.

At the time of injury, Petitioner was **60** 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 $**134,105.28** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**134,105.28**.

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 **$755.22 per week**, the maximum allowable statutory rate, for **20.5 weeks**, because the injuries sustained caused the loss of use of **10% of the left hand**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$755.22 per week**, the maximum allowable statutory rate, for **87.5 weeks**, because the injuries sustained caused the loss of use of **17.5% of the person as a whole with regard to the cervical spine**, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$755.22 per week**, the maximum allowable statutory rate, for **75 weeks**, because the injuries sustained caused the loss of use of **15% of the person as a whole with regard to the left shoulder**, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **December 21, 2015** through **October 22, 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

March 30, 2020
Date

APR 3 - 2020

STATEMENT OF FACTS and CONCLUSIONS OF LAW

Petitioner testified that on 12/21/15 she was working for the Respondent as a full-time motor truck driver for the Department of Streets and Sanitation. This involved driving large trucks, such as garbage and snowplow trucks. On 12/21/15 she was driving a garbage truck with laborers riding on the truck who collected garbage as she drove. She had to exit the truck due to a problem at the rear of the truck and after rectifying the situation, she walked back to the front of the truck to get back into the driver's seat. This involved stepping up onto a step by the driver's door, grabbing a railing with her right hand and holding onto the steering wheel with her left hand. As she was pulling herself up into the truck, she testified she felt a pop in the left shoulder area and pain in her left shoulder and neck. As Petitioner began to drive, she felt increased pain to her left shoulder and neck. She

testified that she advised her supervisor about the incident. The following day Petitioner returned to work and was able to work her full shift, but she continued to experience pain in her left shoulder and neck. On 12/23/15, Petitioner testified she was unable to perform her job due to the pain she was experiencing and was sent to the company clinic, MercyWorks, by the Respondent. Petitioner testified she had no neck, left shoulder or left hand problems or treatment prior to 12/21/15.

Petitioner was examined by Dr. Anderson at MercyWorks on 12/23/15. She provided a consistent history of the accident. She was diagnosed with left cervical and left shoulder strains and was provided with pain medication, referred to physical therapy and returned to her work duties. Petitioner testified that she continued to work and attended therapy, but that her left neck and shoulder pain and discomfort continued to get worse. Eventually, Dr. Anderson prescribed a cervical MRI. (Px1).

The 1/31/16 MRI reflected a combination of a left lateral predominant circumferential diffuse disc bulge, disc osteophytes, uncovertable osteophytes and facet osteophytes contributing to mild-to-moderate central canal stenosis and severe left neuroforaminal narrowing at C5/6. Disc material was mildly indenting the spinal cord at C5/6 without significant compression, and the left L6 nerve root appeared to be compressed. (Px6). The 2/8/16 report of Dr. Anderson notes the MRI showed disc-osteophytes and facet osteophytes that were contributing to mild to moderate cervical canal stenosis and severe left neuroforaminal narrowing at C5/6 with left C6 nerve compression. (Px1). Petitioner testified that following review of the MRI results she was referred to spine specialist, Dr. Fisher.

Petitioner presented to orthopedic surgeon Dr. Fisher on 2/19/16. She reported moderate to severe neck pain and occasional left upper extremity symptoms into the arm and forearm. Dr. Fisher took a history from the Petitioner concerning her work-related accident on 12/21/15, conducted an examination, ordered x-rays, and reviewed the cervical MRI. He recommended Petitioner undergo a cervical epidural steroid injection, which appears to have been performed that same day. Home exercise was recommended pending follow up. (Px2).

Petitioner returned to see Dr. Fisher on 3/9/16, advising that she attempted to return to full duty work and ultimately had so much pain that on 3/6/16 she went to the emergency room, where she reported progressively worsening neck pain since 3/3/16 and limited improvement with therapy (see Px7). Petitioner reported increasing left upper extremity radicular symptoms with numbness extending to the first and second digits of the left hand. Aggravating factors included moving her neck. Dr. Fisher examined the Petitioner and again reviewed the diagnostic studies. He prescribed a Medrol Dosepak as well as Flexeril and opined that Petitioner was a candidate for a C5/6 anterior cervical discectomy and total disc replacement. She was also given a sling for her left arm and was taken off of work. He further opined that, given that her symptoms began on 12/21/15 at the time of her work accident and remained persistent with no previous history of cervical radiculopathy, the Petitioner's current state of ill-being was directly related to the work accident. (Px2). Petitioner testified that, based on concern about shoulder involvement, Dr. Fisher referred her to Dr. Mass.

Petitioner initially saw shoulder specialist Dr. Mass on 3/22/16 at the University of Chicago with complaints of neck, left shoulder and arm pain with numbness and tingling of the left thumb and index finger. Petitioner reported the 12/21/15 work injury and that she had a pop and significant left shoulder pain. He diagnosed cervical radiculopathy and a possible left rotator cuff tear. He noted she was treating with Dr. Fisher for the neck and stated that "while a lot of her symptoms are coming from the cervical spine, we do think that she has some rotator cuff issues as well." A left shoulder MRI was obtained on 3/28/16, indicating: 1) mild tendinosis of the supraspinatus without discrete rotator cuff tear, 2) AC joint arthritis and 3) a small amount of fluid within the subacromial/subdeltoid bursa suggesting a mild bursitis. (Px3).

Petitioner further testified that she returned to see Dr. Mass on 4/26/16, and he indicated the MRI revealed significant impingement syndrome but no rotator cuff tear. He ordered physical therapy and continued

Petitioner off work. (Px3). On 4/29/16, Petitioner went to the Little Company of Mary ER due to complaints of left neck pain, noting her medications were not working. (Px8).

Orthopedic surgeon Dr. An, Respondent's Section 12 examiner, on 5/10/16 examined Petitioner and reviewed her records and diagnostic testing. He indicated that "diagnosis is clear" of a herniated disc and foraminal stenosis causing left C6 radiculopathy. While he indicated she probably had a preexisting cervical spondylosis, the work injury aggravated the condition or caused the disc herniation with subsequent left-sided radiculopathy. He also agreed with Dr. Fisher's recommendation for C5/6 anterior discectomy but with fusion as opposed to disc replacement. (Px9; Rx6).

On 6/3/16, Petitioner returned to Dr. Mass noting improved left shoulder pain with negative impingement and full active range of motion. He indicated he would see her again as to the shoulder following cervical surgery. However, Petitioner returned prior to the surgery, on 7/12/16, and reported ongoing left shoulder and neck pain, noting she improved with subacromial injection, but she was not making progress in therapy due to her cervical spine. Dr. Mass advised she needed a cervical epidural "before we can determine whether we can treat her conservatively for her shoulder", and she was continued off work. (Px3).

Petitioner continued to follow up with Dr. Fisher with ongoing complaints of neck and left upper extremity pain, numbness and limited range of motion. (Px2). Petitioner had cardiac issues and had to be released by her cardiologist before undergoing surgery, noting she remained off work and continued to receive benefits. Petitioner testified that she finally received medical clearance to undergo surgery, and on 10/10/16 underwent a C5/6 anterior cervical discectomy and anterior fusion with hardware at St. Joseph Hospital. Post-operative diagnosis was C5/6 disc herniation with spinal stenosis. (Px5).

Petitioner testified that she continued to follow up with Dr. Fisher post-surgically. She continued to complain of pain and numbness to her left thumb and index finger, which did not resolve with surgery. She was provided with a cervical collar, advised to remain off work and to avoid lifting anything more than 5 to 7 pounds. At her three-month post-operative visit on 1/12/17, Petitioner reported she was doing well but that she still had numbness to her left thumb and pain between her shoulder blades with limited range of motion in her neck. Dr. Fisher advised her to begin formal physical therapy and stated that as "she has a shoulder injury and is awaiting to move forward with treatment", she was to call her shoulder doctor for an appointment. On 3/2/17, Petitioner reported doing well with some left trapezius pain. She denied upper extremity radiculopathy. She was advised by Dr. Fisher to continue home exercise and was to follow up with her shoulder specialist with "restrictions based on her shoulder specialist only." (Px2).

On 3/7/17, Dr. Mass noted Petitioner had undergone the cervical surgery and her neck was healed, so "its time to arthroscope her left shoulder to do an AC joint resection and biceps tenodesis with some subacromial decompression." He also noted a left carpal tunnel syndrome (CTS) "that has been unmasked by relieving her C6 nerve root", and recommended CTS release surgery. Left shoulder x-rays showed mild osteoarthritis in the AC and glenohumeral joints. (Px3).

On 5/11/17, Dr. Fisher noted Petitioner denied neck pain, though she had some numbness to the palmar surface of the left first and second fingers and the thenar eminence. She had occasional swelling in the left wrist which she attributed to an old fracture. It was noted she was scheduled for left shoulder surgery. Diagnosis included left CTS and again noted she was allowed to work full duty as to the neck, but that following shoulder surgery she should undergo therapy for the neck as well. He indicated that CTS surgery was being contemplated to occur at the same time as shoulder surgery, and he opined: "The numbness in her hand, most likely is a double crush phenomenon that most likely has some component of C6 radiculopathy from her neck. Also, irritation of the shoulder can affect her brachial plexus causing symptoms, swelling at the wrist from her previous fracture. It can cause symptoms as can (CTS)." (Px1)

Petitioner returned to Dr. Mass on 6/1/17 after she was cleared by Dr. Fisher, reporting persistent problems to her left shoulder, and Dr. Mass again recommended surgery. Petitioner underwent arthroscopic left shoulder surgery with Dr. Mass on 6/9/17 involving limited debridement, including cutting of the biceps tendon, subacromial decompression and Mumford procedure, as well as an open bicep tenodesis and a left carpal tunnel release. Post-operative diagnosis was biceps tendonitis, subacromial inflammation, AC joint arthritis and left CTS. (Px3).

Petitioner followed up with Dr. Mass after the surgery on 6/22/17, reporting her hand numbness was resolving. She was advised to remain off work unless desk duty was available. On 7/20/17, Petitioner reported she was continuing to improve but would still have pain with shoulder use. She was advised to start physical therapy. (Px3).

Petitioner testified that she was improving, however, the pain to her left shoulder was getting worse while in physical therapy, which was noted in Dr. Mass' 9/5/17 report. She testified there was concern the increased pain was caused in therapy. On 10/3/17, Dr. Mass ordered another MRI of her left shoulder and continued Petitioner off work. (Px3).

On 10/11/17, Dr. Fisher noted Petitioner complained of ongoing left thumb numbness, as well as that Petitioner had tripped on her stairs and injured her left upper extremity with pending left shoulder MRI. She was advised to follow up with him as needed. (Px1). 10/13/17 left shoulder MRI reflected post-surgical changes of the biceps, subacromial decompression, partial tearing of the supraspinatus with retraction of the posterior fibers, and questionable detachment of the anterior superior labrum "though it appears similar to the prior exam." (Px3).

Dr. Mass recommended another surgery, and on 11/2/17 performed a second left shoulder surgery to repair the rotator cuff with limited decompression. (Px3). Petitioner testified that she continued to follow up with Dr. Mass following surgery and was ordered to begin physical therapy, initially focused on range of motion, then strengthening. During this time, Petitioner was held off of work by Dr. Mass. (Px3).

Petitioner testified she returned to Dr. Fisher on 3/8/18 with numbness and tingling to her left thumb, but mainly mild left trapezius pain, with difficulty sleeping and losing her voice with prolonged talking or turning her head to the left. She also complained of numbness to the left thenar eminence and thumb with shoulder motion. X-rays showed a solid fusion and no evidence of hardware failure or loosening. Dr. Fisher recommended an otolaryngologist evaluation and EMG/NCV testing of the upper extremities to evaluate whether the numbness and tingling was related to her shoulder, wrist or neck. He also recommended she continue her home exercise program. (Px1).

On 3/26/18, ENT Dr. Bayan opined, following layrngostroboscopy, that Petitioner's vocal issues were likely due to acid reflux. (Px3). On 3/29/18, Petitioner told Dr. Mass she had minimal left shoulder pain with range of motion exercises, and she had good supraspinatus strength. She was advised to continue strengthening in physical therapy. On 5/16/18 she was advised to start work conditioning. (Px3).

Petitioner testified that she attended work conditioning at Athletico on 5/17/18. The final report in evidence is a 6/21/18 report from Athletico indicating Petitioner had met 60% of her work demands and was limited to the medium duty level. She was only completing half days of conditioning and limited her time due to hip and low back pain. She had met two out of four long term goals. On 6/28/18, Dr. Mass injected the biceps area due to complaints of pain. On 8/2/18, Petitioner advised Dr. Mass that work conditioning was causing significant discomfort. He discontinued work conditioning and advised Petitioner to attend regular physical therapy for her left shoulder. Petitioner attended physical therapy, making improvement to range of motion and strength. She

was advised she could perform light duty with no truck driving or overhead activity above 35 pounds. On 9/27/18, Dr. Mass noted Petitioner's therapy program had been delayed but started that week. He advised her to continue and released her to light duty and desk work with light driving allowed but avoidance of repetitive overhead activities or push/pull/carry/lifting activities. (Px3).

On 11/8/18, Petitioner saw surgeon Dr. Aultman at University of Chicago and he indicated Petitioner reported therapy was "quite helpful", that she had almost complete left shoulder range of motion and her strength had improved to where she could perform all of her daily activities. Her only reported limitations were neck soreness and a sense of fatigue after continued use of the left shoulder. He determined Petitioner had reached maximum medical improvement (MMI) and was ready to return to unrestricted work duties. (Px3). Though the Arbitrator did not locate the report in Px3, both parties indicate that Petitioner was released by Dr. Mass to return to work full duty on 12/2/18.

Petitioner testified that the Respondent did not accommodate the light duty restrictions issued by Dr. Mass. During work hardening her shoulder was improving but with ongoing soreness and use of pain pills. She remained off work through the end of work conditioning. Use of the left arm remained difficult with lifting and sleeping on her left side. She continues to have soreness and pain in the shoulder but agreed she did improve after the second surgery. Lifting or holding her arms up overhead for a prolonged time are difficult for her, especially on the left. She testified that Dr. Mass injected her shoulder a few months before arbitration and he recommended physical therapy, but that her job would not allow her to attend. She has no current work restrictions regarding her neck condition. Her neck gets stiff and sore with driving. She has had no new injuries to her neck.

Petitioner testified that when she returned to work on 12/2/18 as a driver, she would notice it was hard to drive the truck and it stressed her arm to do so. She still has to pull herself up into the truck cab when entering it and has ongoing difficulty with this as well. She noted problems with her throat and that she sometimes loses her voice after undergoing cervical surgery, and that she did not have this prior to the surgery.

On cross-examination, Petitioner testified that her job with Respondent requires a CDL license, which she last renewed about four years ago and only needed a vision test. She testified that a self-certification for her physical condition wasn't asked for. Her pay rate when she returned to work in December 2018 was the same or higher than what she earned at the time of injury, but it has not increased since 12/18. She has not requested any reasonable accommodations but testified she bid into a new job in the "CARTS" program, which involves driving a heavier truck to deliver garbage cans and serving the entire city versus a specific route, and therefore involves more driving than she had to do driving a garbage truck. It is still within the Streets and Sanitation Department. She most recently saw Dr. Mass in approximately August 2019 or so and has an appointment scheduled with him in the future due to her shoulder soreness and stiffness but acknowledged that these visits were being covered by her own personal insurance.

The parties stipulated that the Respondent's TTD credit totaling $134,105.28 is applicable to an undisputed stipulated TTD period from 3/9/16 through 12/2/18 (144-5/7 weeks).

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 neither party submitted an AMA permanent partial impairment report or rating into evidence. 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 motor tuck driver at the time of the accident and has returned to that position upon her release from Dr. Fisher and Dr. Mass. She testified she did have some difficulties with some of her job activities, mainly due to her shoulder, but was released to full work duties. She indicated she has bid into a new job with the Respondent, but it sounds very similar in terms of both involving driving a truck. This factor carries moderate weight in the permanency determination.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 60 years old at the time of the accident. Neither party has produced any significant evidence which tends to show the impact of the Petitioner's age on any permanent partial disability resulting from the 12/21/15 accident. Therefore, this factor carries minimal weight.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner testified that she earns the same or a greater wage working for Respondent at the time of the hearing versus the time of the accident. She did not testify that she has lost any level of earning capacity with the Respondent as a result of this accident. This factor carries 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 that as a result of Petitioner's 12/21/15 accident she pursued a course of treatment to address cervical, left shoulder and left CTS conditions, She testified that prior to 12/21/15 she had no physical problems with her neck, left shoulder or left wrist and hand, nor had she ever injured those parts of her body or had treatment rendered to them. She further testified that she had been able to perform her job duties as a motor truck driver without any noticeable difficulties. She underwent a one level cervical discectomy and fusion, two left shoulder surgeries and a left CTS release surgery. After returning to work following releases to unrestricted work duties by Dr. Fisher and Dr. Mass, Petitioner testified she has continued to experience some problems while performing her job as a motor truck driver, including pulling herself up into the truck cab with her arms, as well as holding and turning the steering wheel. She also testified that turning her neck was restricted at times. Petitioner also experienced difficulty when performing her daily normal activities at home, such as, cleaning around the house and lifting heavy objects due to a loss of strength and difficulty with overhead reaching. Petitioner further testified that she continues to take medication when she experiences pain and most recently

returned to Dr. Mass for a cortisone injection into her left shoulder. The Arbitrator notes that while the Petitioner testified to this shoulder injection as occurring a few months prior to the hearing, no record of this procedure was located in the evidence presented to the Arbitrator.

With regard to left CTS, there does not appear to have been any specific treatment directed to this injury following CTS release surgery, and the Arbitrator did not note any ongoing left CTS complaints in the subsequent medical records of Dr. Mass.

The fifth factor carries the most 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 similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of use of 17.5% of the person as a whole pursuant to §8(d)2 of the Act with regard to the cervical spine, to the extent of the loss of use of 15% of the person as a whole pursuant to §8(d)2 of the Act with regard to the left shoulder, and to the extent of the loss of use of 10% 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

KATHLEEN LEAKE,

Petitioner,

21IWCC0021

vs. NO: 16 WC 14444

ENVOY AIR,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation and nature and extent, and being advised of the facts and law, affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes the following clarifications.

We initially note that temporary total disability was also listed as an issue on Petitioner's Petition for Review. However, this was not an issue at trial and was not argued in Petitioner's brief.

We clarify that Petitioner's "condition of ill-being" was related to her June 11, 2015 injuries only until the August 27, 2015 visit to Pronger Smith Medical Care. At that time, Dr. Obert-Hong recorded that Petitioner had no complaints, no rash and no skin lesions. We find that, as of this visit, Petitioner no longer had any "condition of ill-being" related to her skin.

We also modify the Arbitrator's analysis of the first permanency factor in §8.1b(b) of the Act and assign no weight to Dr. Coe's A.M.A. impairment rating report.

All else is affirmed and adopted.

21IWCC0021

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 3, 2018, is hereby affirmed and adopted with the clarifications noted above.

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: JAN 13 2021

Maria Elena Portela
Maria E. Portela

Kathryn A. Doerries
Kathryn A. Doerries

SE/
O: 11/24/20
49

DISSENT

I respectfully dissent from the opinion of the majority and would modify the Decision of the Arbitrator in part. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving the June 11, 2015, work injury caused Petitioner to sustain a loss of 1% use of the whole person.

Petitioner worked as a flight attendant for Respondent. On the date of accident, she stayed in a hotel during an overnight layover in Iowa. The next morning, she woke up with severe itching. Petitioner then noticed little red marks and bites all over her back, torso, arms, and thighs. Petitioner's symptoms were so severe that she immediately sought medical treatment when she returned to Chicago. After receiving a diagnosis of insect bites, Petitioner began taking the recommended over-the-counter medication. The evidence reveals that Petitioner endured ongoing and severe discomfort due to the insect bites for over two months. Petitioner credibly testified that even three years later, she continues to suffer from occasional bouts of severe itching.

Contrary to the majority, I believe Petitioner met her burden of proving she sustained a permanent and partial loss of the use of her whole person as a result of this work incident. In reaching this conclusion, I note that an AMA rating is only a guide and does not directly correlate to a finding of a permanent disability. In fact, Dr. Coe, Petitioner's Section 12 examiner, examined Petitioner and assigned an impairment rating of 0% only because he found there is no appropriate impairment rating for Petitioner's condition pursuant to the relevant AMA Guides. Furthermore, the Commission can make an award of permanent partial disability even if an expert has determined the AMA impairment rating is "0." The Arbitrator correctly determined that Petitioner's current condition of ill-being is causally related to the work incident. However, he failed to appropriately compensate Petitioner for her ongoing condition and instead

determined Petitioner sustained no permanent disability due to the work incident. This failure to award any permanent partial disability benefits is not supported by the credible evidence of Petitioner's chronic condition due to the initial insect bites and the subsequent physical reaction she sustained during the work incident. I believe the evidence supports a finding that Petitioner sustained a 1% loss of use of the whole person as a result of the June 11, 2015, work incident.

For the forgoing reasons, I would modify the Decision of the Arbitrator in part. Petitioner clearly met her burden of proving she sustained a permanent partial disability due to the June 11, 2015, work incident.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LEAKE, KATHLEEN
Employee/Petitioner

Case# **16WC014444**

21IWCC0021

ENVOY AIR
Employer/Respondent

On 8/3/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON
DAVID B MENCHETTI
10 S STATE ST STE 1250
CHICAGO, IL 60603

3998 ROSARIO CIBELLA & ASSOC, LTD
ANDREW M LUTHER
116 N CHICAGO ST STE 600
JOLIET, IL 60432

21IWCC0021

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

Kathleen Leake
Employee/Petitioner

Case # **16 WC 014444**

v.

Consolidated cases: **NA**

Envoy Air
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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **07-09-18**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **06/11/2015**, 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*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned $**25,821.64**; the average weekly wage was $**496.57**.

On the date of accident, Petitioner was **65** 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 under Section 8(j).

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

Respondent is entitled to all credit for medical bills paid under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $297.94 per week for 0 weeks, because the injuries sustained caused the 0% 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

08-03-18
Date

AUG 3 - 2018

Attachment to Arbitration Decision Form
Kathleen Leake v. Envoy Air
16WC014444

FINDINGS OF FACT

On June 11, 2015, the Petitioner Kathleen Leake (Petitioner) was working for the Respondent Envoy Airlines (Respondent) as a flight attendant. Petitioner was required to take flights and to stay overnight in hotels chosen by the company. The hotels are paid for by the Respondent. Sometimes the flight assignments last several days.

On June 11, 2015, Petitioner was on a trip for the Respondent. Petitioner flew from Chicago to Waterloo, Iowa on June 10, 2015 and worked that flight as a flight attendant. Petitioner was going to spend the night in Waterloo and work an early morning flight back to Chicago on June 11. Petitioner gets paid per diem expense money by Respondent when she is staying over in a hotel.

Petitioner stayed in the Respondent-chosen hotel in Waterloo. Sometime after midnight on June 11, 2015, Petitioner woke up in the hotel itching and scratching.

Petitioner worked the flight back from Waterloo to Chicago on June 11. While on the flight back to Chicago, Petitioner noticed that she had little red marks and bites all over her back, torso, arms and thighs and that she was noticing extreme itching.

Upon landing in Chicago, Petitioner called crew scheduling to notify them that she would not complete the trip because of the extreme itching. Petitioner immediately sought medical treatment at Pronger Smith Medical Care (Pronger Smith) in Tinley Park, Illinois.

On June 11, 2015 at 9:45 am, Petitioner was seen at Pronger Smith. (PX 1, pg. 1) Her chief complaints included bites on her arms, legs and back. (PX 1, pg. 1) Her history stated that Petitioner was a flight attendant and stayed at a hotel in Waterloo, Iowa last night and that she woke up in the middle of the night with what she thinks are little bug bites on her arms and neck.

(PX 1, pg. 1) The bites were itchy. (PX 1, pg. 1) Physical exam of Petitioner's skin revealed pinpoint erythematous papules with some excoriations scattered along the upper extremities and neck. (PX1, pg. 2) The summary of her treatment was insect bites for which she was recommended to take Zyrtec and Pepcid and use over-the–counter cortisone or calamine as needed. (PX 1, pg. 2) Billing codes for this encounter included insect bite and nonvenomous "anthrop" bite. (PX 1, pg. 11)

On August 27, 2015, Petitioner was seen again at Pronger Smith Clinic. (RX 2) Petitioner testified she was still taking the Zyrtec at that time. Petitioner did not report anything unusual at that time. (RX 2, pg. 3)

Prior to June 11, 2015, Petitioner experienced no problems with her skin or with any insect or bedbug bites.

After June 11, 2015, Petitioner followed the advice she was given at Pronger Smith and took the Zyrtec and used the itching cream as needed. As of the date of the hearing, Petitioner still experiences itching and scratching on her back and on her torso that comes and goes. Petitioner uses over-the-counter remedies. Petitioner sometimes notices severe bouts of itching.

Petitioner was seen by Dr. Jeffrey Coe at the request of the Respondent pursuant to Section 12 of the Act on July 18, 2017. Dr. Coe's case summary was that Petitioner developed a pruritic, erythematous papular rash of her neck and upper extremities after residing in a hotel as part of her work activities for Respondent on June 11, 2015. Dr. Coe reported that Petitioner was diagnosed with insect bites. There was no skin rash at that time. Dr. Coe reported that Petitioner had fully recovered from the pruritic rash she developed during the course of work activities for Envoy Air on June 10/11, 2015. (RX 1, pg. 3) Dr. Coe gave Petitioner a 0% impairment rating because there is no appropriate impairment rating for her work-related condition based on the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition. (RX 1, pg. 4)

CONCLUSIONS OF LAW

21IWCC0021

Accidental Injuries

The Arbitrator concludes that the Petitioner sustained accidental injuries that arose out of and in the course of her employment with Respondent on June 11, 2015. The Arbitrator finds that Petitioner was exposed to bedbug bites on June 11, 2015 at the hotel in Waterloo, Iowa. The Arbitrator bases this finding on the Petitioner's history of the occurrence, and the diagnoses both of Pronger Smith and of Dr. Coe.

There is apparently no real dispute that Petitioner was "in the course of" her employment with Respondent when she woke up in the hotel itching and scratching. Petitioner was on a layover in Waterloo, Iowa in the middle of a work trip, returning to Chicago on a flight the next day. Respondent selected the hotel and paid Petitioner a per diem payment while she was at the hotel. On those premises, the Arbitrator concludes that Petitioner was a travelling employee while she was on a layover in Waterloo. The Arbitrator notes that the Commission consistently has held that flight attendants on layover are considered to be travelling employees. For example, Debra Garesche v. ATA Airlines, 10 IWCC 0033; & Kimberly Wienick v. United Airlines, 11 IWCC 0561.

As it relates to the "arising out of" element for a traveling employee, the inquiry into whether a traveling employee's accidental injuries are compensable must focus on reasonableness and foreseeability. Wienick, above, citing Chicago Extruded Metals v. Industrial Comm'n, 77 Ill.2d81 (1979). In this case the Arbitrator concludes that Petitioner's exposure to bedbug bites was both reasonable and forseeable to the Respondent, especially when the Respondent chose and paid for the hotel in which Petitioner stayed during her layover. Additionally, anyone who travels frequently and shares living and sleeping quarters where other people have previously slept has a higher risk of being bitten and or spreading a bed bug infestation.

Causal Connection

The Arbitrator concludes that the Petitioner's current condition of ill-being is causally connected to the accidental injuries of June 11, 2015.

A chain of events that demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability is sufficient evidence to prove a causal nexus between the accident and the employee's injury and an accident need only be a cause of the condition of ill being. Schroeder v. IL Workers' Compensation Comm'n., 2017 IL App (4th) 160192WC, pars. 19 & 28.

Petitioner credibly testified that she was in good health on June 11, 2015 and was working in her full duty job as a flight attendant for Respondent. Petitioner had never had any skin problems before. Petitioner immediately reported the accidental injuries including the complaint of extreme itching to the Respondent and to her medical provider. Both Pronger Smith and Dr. Coe referred to the diagnosis of insect bites causing a rash on Petitioner's skin. Dr. Coe reported that Petitioner had a "pruritic rash she developed during the course of work activities for Envoy Air" on the date of the accidental injuries. Dr. Coe's report also refers to Petitioner's "work-related condition."

Permanent Partial Disability

The Arbitrator concludes that Petitioner sustained accidental injuries that caused no loss of her whole person pursuant to Section 8(d)2 of the Act.

Pursuant to Section 8.1b(b), five factors are to be weighed in determining the level of permanent partial disability (PPD) for accidental injuries occurring on or after September 1, 2011.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that Dr. Coe reported that Petitioner had impairment rating of 0%. However, Dr. Coe reported that the reason for the impairment rating of 0% was because "there is no appropriate impairment rating for (Petitioner's) work-related condition based on the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition," not because the impairment rating was actually calculated to be 0%. Moreover, the Arbitrator notes that a permanent partial disability award as a matter of law can be made even when the impairment rating is 0%. Continental Tire of the Ams. V. IL Workers' Comp. Comm'n, 2015 IL App (5th) 140445WC, par. 18. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the Petitioner was employed as flight attendant. The Arbitrator concludes that the Petitioner's her permanent partial disability has not affected her employment. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 65 years old at the time of the accidental injuries. Because of her age, Petitioner has to live with the permanent partial disability until her life expectancy expires. The Arbitrator considers Petitioner to be an older individual. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner has returned to work as a flight attendant. The Arbitrator therefore gives some 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 Petitioner's current complaints are uncorroborated by the medical records of Pronger Smith. Petitioner visited the clinic twice and was prescribed over-the-counter medications to take as "as needed." Petitioner relates her current, occasional itching to insect bites from three years ago. The Arbitrator finds this testimony incredible and gives some weight to this factor.

The determination of PPD is not simply a calculation but an evaluation of the five factors in Section 8.1b(b). In making this evaluation of PPD, no single enumerated factor is the sole determinant of PPD. Therefore, after applying Section 8.1b(b), and considering the relevance and weight of each of the five factors, the Arbitrator concludes that as result of the accidental injuries, Petitioner has sustained 0% loss of use of her whole person under Section 8(d)2.

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

YOLANDA MORTON,

Petitioner,

vs. NO: 18 WC 2119

CHICAGO BOARD OF EDUCATION,

Respondent.

21IWCC0022

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by Petitioner and Respondent herein and notice provided to all parties, the Commission, after considering the issues of causal relationship, temporary total disability benefits, medical expenses, prospective medical care, and penalties and fees, and being advised of the facts and the law, provides supplemental analysis but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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. Causal Relationship

As did the Arbitrator, the Commission affords greater weight to the opinions of Dr. Darwish over those of Dr. Singh. Unlike the Arbitrator, though, the Commission finds Dr. Singh's opinions were predicated on valid information such as Petitioner's presentation at the time of her evaluation and his review of the MRIs, but Dr. Singh's opinions are simply not as persuasive of those of Dr. Darwish.

Dr. Darwish persuasively explained Petitioner suffered from spondylolisthesis and lumbar radiculopathy which necessitated surgical treatment. PX13, p. 8-9. Dr. Darwish performed surgery on June 19, 2018 which improved Petitioner's back pain and resolved her left lower

extremity pain, but Petitioner developed right-sided calf pain. PX13, p. 11. Dr. Darwish performed surgery consisting of hardware removal on October 26, 2018 which resolved Petitioner's right-sided calf pain, but she continued to complain of back pain. PX13, p. 12. Given Petitioner's ongoing complaints of back pain, Dr. Darwish is recommending a spinal cord stimulator. *Id.* Dr. Darwish testified he reviewed Petitioner's pre-accident MRI (2/1/17) and her post-accident MRI (1/16/18) and found a progression in her condition, and moreover, her accident aggravated her pre-existing condition. PX13, p. 16.

In contrast, Dr. Singh reviewed two pre-accident MRIs (4/23/13 & 7/27/15) and a post-accident MRI (1/30/18) and found no progression of Petitioner's condition. RX2. Dr. Singh further found based upon Petitioner's presentation during his evaluation, she exhibited Waddell findings. *Id.* Dr. Singh diagnosed a strain and found surgery not indicated. *Id.* The Arbitrator found Dr. Singh's opinions "not credible" citing Dr. Singh's lack of explanation of the meaning of Waddell findings and the lack of the MRIs being entered into evidence. We find this to be in error but nonetheless afford greater weight to the opinions of Dr. Darwish.

As previously discussed, Dr. Darwish provided a reasoned explanation as to Petitioner's current condition of ill-being and her need for treatment. There is no question Petitioner suffered from a pre-existing condition which necessitated periodic treatment. On May 18, 2017, Petitioner presented to Dr. Elliot-Pearson complaining of low back pain, and a referral to neurological surgery was provided. PX4. The record is devoid of any evidence that Petitioner sought any treatment until her accident of January 10, 2018. Since her accident, Petitioner has sought uninterrupted care for her lower back condition. Accordingly, we affirm the Arbitrator's finding as to causal relationship and the need for prospective medical care- a spinal cord stimulator.

II. Penalties and Fees

Petitioner argues penalties and fees should be imposed as it was unreasonable for Respondent to rely on Dr. Singh's opinion. "The employer, therefore, bears the burden of justifying the delay if the employee challenges it, and the employer is held to a standard of objective reasonableness in order to avoid the severe sanctions of *sections 19(k)* and *(l)* and the attorneys' fees and costs provisions of *section 16 of the Act* (see *820 ILCS 305/19(k), (l), 16* (West 1998))." *R. D. Masonry v. Industrial Commission*, 215 Ill. 2d 397, 408-409, 830 N.E.2d 584 (2005). "When the employer acts in reliance upon a responsible medical opinion or when there are conflicting medical opinions, penalties are not ordinarily imposed. [citation omitted]. As long as the insurer 'had a legitimate doubt, from a legal standpoint, of its liability, its conduct [refusing payment] was not unreasonable.' [citation omitted]." *Avon Products v. Industrial Commission*, 82 Ill. 2d 297, 302, 412 N.E.2d 468 (1980).

The Commission affirms the Arbitrator's finding that penalties pursuant to Sections 19(k) and (l) and fees pursuant to Section 16 of the Act are not warranted. Although the Commission chose to afford greater weight to opinions of Dr. Darwish, Respondent reasonably relied on the opinions of Dr. Singh.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 4, 2019 is hereby affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,402.04 per week for a period of 80 weeks, representing January 11, 2018 through July 24, 2019, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent is entitled to a credit of $16,824.48 for temporary total disability benefits paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $715.00 to Dr. Harsoor; $108,343.00 to Hinsdale Orthopedics (Dr. Darwish); $7,748.00 to Modern Pain consultants (Dr. Khan); $109,982.50 to Advocate Good Samaritan Hospital; and $917.00 to the City of Chicago for EMT services, as provided in §8(a) and subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any provider 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 provide and pay for the spinal cord stimulator and the attendant care as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that penalties pursuant to Sections 19(k) and (l) and attorneys' fees pursuant to Section 16 of the Act are denied.

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

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

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.

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.

21IWCC0022

DATED: JAN 15 2021

L. Elizabeth Coppoletti

LEC/cak

O: 11/18/2020

Stephen Mathis

43

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on November 18, 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 19(b) ARBITRATOR DECISION
CORRECTED

MORTON, YOLANDA
Employee/Petitioner

Case# **18WC002119**

CHICAGO BOARD OF EDUCATION
Employer/Respondent

21IWCC0022

On 10/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.79% 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:

0786 BRUSTIN & LUNDBLAD LTD
TEN N. DEARBORN
10 N DEARBORN ST 7TH FL
CHICAGO, IL 60602

0559 CHGO BOARD OF EDUCATION
MICHAEL COHEN
ONE N DEARBORN ST SUITE 900
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

G Injured Workers= Benefit Fund ('4(d))
G Rate Adjustment Fund ('8(g))
G Second Injury Fund ('8(e)18)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

YOLANDA MORTON,
Employee/Petitioner

v.

CHICAGO BOARD OF EDUCATION,
Employer/Respondent

Case # **18** WC **02119**

Consolidated cases: ____

21IWCC0022

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

DISPUTED ISSUES

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. Was there an employee-employer relationship?
C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. What was the date of the accident?
E. Was timely notice of the accident given to Respondent?
F. Is Petitioner's current condition of ill-being causally related to the injury?
G. What were Petitioner's earnings?
H. What was Petitioner's age at the time of the accident?
I. What was Petitioner's marital status at the time of the accident?
J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. Is Petitioner entitled to any prospective medical care?
L. 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, JAN. 10, 2018, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $ -; the average weekly wage was $ **2,103.06**.

On the date of accident, Petitioner was **58** years of age, *with* **one** dependent child.

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

Respondent shall be given a credit of $ **16,824.48** for TTD, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $16,824.48.

Respondent is entitled to a credit of $(to be shown per stipulation) 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 $715.00 to Dr. Harsoor, $108,343.00 to Hinsdale Orthopedics (Dr. Darwish), **$7,748.00** to Modern Pain Consultants (Dr. Khan), $109,982.50 to Advocate Good Samaritan Hospital and $917.00 to the City of Chicago for EMT services as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for all 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.

Regarding prospective medical treatment, Respondent shall pay for a spinal cord stimulator as recommended by Dr. Darwish and Dr. Harsoor.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,402.04/week for a period of 79-6/7 weeks, commencing Jan. 11, 2018 through July 24, 2019, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from Jan. 11, 2018 through July 24, 2019, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $16,824.48 for temporary total disability benefits that have been paid.

Penalties

Petitioner has not proven entitlement to payment of any penalties or fees under Sections 19(l), 19(K) or 16. 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.

Robert M. Harris

Signature of Arbitrator Robert M. Harris

Date: October 3, 2019

ICArbDec19(b)

OCT 4 - 2019

IN THE ILLINOIS WORKERS' COMPENSATION COMMISSION

YOLANDA MORTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.: 18 WC 02119
	)	
CHICAGO BOARD OF EDUCATION,	)	
	)	
Respondent.	)	

MEMORANDUM OF DECISION OF ARBITRATOR
FINDINGS OF FACT

TESTIMONY OF PETITIONER

Petitioner was in her usual state of good health when on Jan. 10, 2018 she sat on a table while teaching a health class. The table collapsed causing Petitioner to fall. (T.P. 30). She immediately experienced severe pain. She was taken by ambulance to Trinity Hospital on the same day and from there she went to her primary care physician Dr. Wanda Elliot Pearson. (T.P. 32).

Petitioner had experienced back pain multiple times in the past several years leading up to Jan. 10, 2018 but she had always quickly recovered her health with therapy or one or two steroid injections. As of Jan. 10, 2018, Petitioner's back was pain free until the table collapse accident.

Petitioner's job as a Physical Education teacher was not strenuous but it was highly active. She had to demonstrate warm up routines, athletic routines and drills to her classes. (T.P. 16). She had to obtain athletic equipment from storage and arrange it for use by her students. (T.P. 15.) She had to get the books for health class and transport them in a cart to wherever the health class was meeting. (T.P 20). She had to use a long pole with a hook to open the windows in season because there was no air circulation and close them at the end of the day. (T.P. 22). In season she also had to roll out fans. (T.P. 23). She had to put out chairs for students who were not participating in exercises and replace the chairs when finished. (T.P. 24). She had to break up fights between students once or twice a week. (T.P. 25, 48). She had to walk the halls to monitor students when they were arriving and when they left for the day. (T.P. 26). She had to be a spotter when students were learning gymnastics. (T.P. 27). The long term degenerative condition of her back and lumbar spine did not prevent her from doing this vigorous work until the accident of Jan. 10, 2018. (T.P. 48-49).

Petitioner did have other unrelated health problems, specifically, she suffered from headaches due to exposure to mold. These headaches did prevent her from working but her lumbar spine did not. She was off work from May 2017 to January 8, 2018 due to headaches caused by mold. (T.P. 51).

Petitioner testified that she was a PE teacher at Barnum School from 2006 to the day of the accident. She retired Oct. 17, 2018 so she could get her pension because TTD had been cut-off and she had no other income. (T.P.49-50). When she applied for the pension, she noted on the application that she was forced to retire because Respondent had terminated her TTD. (T.P.50). Before the accident of Jan. 10, 2018, Petitioner had no plans to retire. (T.P. 50).

She sought medical care from Dr. Kahn who gave her an off work slip and ordered Physical therapy which she did at Team Rehab. (T.P. 34). When the therapy didn't help, Dr. Kahn ordered an injection. (T.P. 35). It did not relieve her pain; it just made her blood sugar levels go up. (T.P. 35). Dr. Kahn referred Petitioner to a back surgeon, Dr. Darwish who performed a two level lumbar fusion on June 19, 2018. (T.P. 38). After the surgery, Petitioner was still in pain. (T.P. 39). On October 1st 2018, Dr. Darwish removed a screw but Petitioner continued to experience pain from which she suffers to this day. (T.P. 39).

Dr. Darwish referred Petitioner to Dr. Harsoor, a pain management physician, who recommended a spinal cord stimulator which Petitioner desires to have implanted. (T.P. 40). Petitioner remains in pain, all day, every day, no matter what she is doing. (T.P. 41). She has pain whether she walks or sits. (T.P. 42). Moving different ways while driving causes excruciating pain. (T.P. 43). She needs to sit in a chair with arms to help support her when she stands up. (T.P. 44). She takes Gabapentin and Tramadol every day and Tylenol as needed. (T.P. 45).

PRIOR MEDICAL CARE

On May 13, 2017 Petitioner had a lumbar MRI which showed no significant stenosis and but did show facet arthropathy and mild narrowing at L4-L5. On April 3, 2017 Petitioner had a nerve conduction electromyogram study performed at Trinity Hospital as ordered by Dr. Pearson which showed L5-S1 radiculopathy. On April 13, 2017, Petitioner complained of low back pain to Dr. Pearson. Petitioner had follow-up office visits with Dr. Pearson on 5/18/17 and on 9/11/17 complaining of back pain but there was no follow up, no referral for therapy and no interference with the activities of daily life. Petitioner was fully functioning in 2017 except for mold

induced headaches.

In 2016, Petitioner had therapy for her low back at Trinity Hospital but she did not have any in 2017.

On Sept. 21, 2015, Dr. Harsoor performed a lumbar steroid injection on Petitioner and a month later had another.

Petitioner did not have continuous treatment before the January 10, 2018 work accident. She had brief episodes of conservative treatment in 2017 and after that had no significant problems until Jan. 10, 2018. (T.P. 52). Before Jan. 10, 2018 back pain would come and go but it didn't prevent her from performing her job duties as a P.E. teacher. (T.P. 53).

After Jan. 10, 2018 she could no longer function on the job or at home or in her personal life.

DEPOSITION OF DR. DARWISH

Dr. Darwish is board certified in orthopedics and fellowship trained in adult spine surgery. His practice is 95% adult spine surgery. (D.P. 6). Each year, Dr. Darwish does about 200 operations of the type he performed on Petitioner. (D.P.30).

Dr. Darwish first saw the Petitioner on March 22, 2018. He reviewed an MRI from Jan. 30, 2018 and conducted a physical examination. (D.P. 8). His diagnosis was spondylolisthesis and lumbar radiculopathy. (D.P. 9). In Dr. Darwish's opinion the fall from the table on Jan. 10, 2018 aggravated Petitioner's preexisting condition which necessitated the surgeries that he performed. (D.P. 13).

Dr Darwish also reviewed the lumbar MRI from Feb. 1, 2017. (D.P. 16). Comparing the MRI from before the accident of Jan. 10, 2018 with the MRI after Jan. 10, 2018, Dr. Darwish testified that the post-accident MRI showed more significant degenerative changes at L5-S1. (D.P. 16). Dr. Darwish testified that he also read the patient's records from Trinity Hospital which did not affect his opinions. (D.P. 29).

Dr. Darwish testified that trauma can cause increased back pain in a patient who has spondylolisthesis or spondylolsis at L4-L5. (D.P. 17). This increased pain can be sufficient to prevent a patient from returning to work. (D.P. 17). Previously Petitioner had back pain that waxed and waning but as a result of the fall of Jan. 10, 2018, Petitioner had low back pain consistently rather than waxing and waning. (D.P. 17). As of his

deposition July 9, 2018, Dr. Darwish recommended a spinal cord stimulator for Petitioner. (D.P. 21). Dr. Darwish testified that he disagreed with Respondent's section 12 examiner, Dr. Singh. (D.P. 27). Dr. Darwish testified that a patient with lumbar spondyloslisthesis, low back pain and lower extremity radiculopathy is treated effectively with lumbar fusion back surgery. (D.P. 28).

Dr. Darwish held Petitioner off work and still has not released her to return to work. (D.P. 14). Petitioner has never been able to return to work since Jan. 10, 2018 and has never been at maximum medical improvement. (D.P. 18).

RESPONDENT'S SECTION 12 EXPERT DR. SINGH

Dr. Singh's report indicates he noted positive Waddell signs but he did not explain the significance of Waddell signs generally nor what evidence he saw of symptom magnification or what is axial loading or rotation and its significance. Consequently, the Arbitrator places little weight on Dr. Singh's claim of positive Waddell signs.

Dr. Singh wrote Petitioner is a PE teacher and can return to full duty work but he indicated no awareness of the need for Petitioner to spot for students doing gymnastic routines, or the need for Petitioner to haul heavy health textbooks or demonstrate exercises and physical routines or place fans and chairs for class room use or any of the other physically demanding requirements of Petitioner's job. Consequently the Arbitrator places little weight on Dr. Singh's opinion that Petitioner can return to full duty work.

Dr. Singh indicated Petitioner had non-anatomic pain complaints but he did not identify these complaints or explain why these complaints are non-anatomic. Consequently, the Arbitrator places little weight on Dr. Singh's claim that the pain complaints are non-anatomic.

Dr. Singh asserted Ill State Prescription monitoring programs shows Petitioner had previously been on Tramadol and Hydrocodone but he did not provide any dates. Since there is no showing as to the dates, the Arbitrator places little weight on Dr. Singh's claim that Petitioner had previously been on Tramadol or Hydrocodone or who that gas any influence on his ultimate opinions. It could have been years ago and/or for unrelated conditions.

Dr. Singh authored an addendum opinion letter dated April 25, 2018 in which he stated that he did not recommend surgery because the patient's pain complaints do not correlate with the radiographic findings. Unfortunately he

provides no details specifying which pain complaints do not correlate with which radiographic findings. Nor does Dr. Singh provide the dates of the radiographic findings or whether they were x-rays or MRI's. Dr. Singh's findings lack important details and for this reason the Arbitrator places little weight on his opinions.

Dr. Singh also provided an AMA impairment rating. However, because this is a Section 19(b) proceeding, the Arbitrator shall not consider this (nature and extent of the injury will not be addressed in this Arbitration Decision.)

The Arbitrator finds and concludes Petitioner and Dr. Darwish are credible witnesses. Petitioner's demeanor was credible and she testified forthrightly.

Dr. Darwish performs 200 operations per year just like the operation he performed on Petitioner. In contrast, Dr. Singh's c.v. is not in evidence and we therefore do not know his status regarding performing spine operations or any other relevant biographical and professional information.

Conversely the Arbitrator finds Dr. Singh is less credible than Dr. Darwish. The Arbitrator notes that Dr. Singh claimed to have personally reviewed Petitioner's lumbar MRI's from 2013 and 2015. But these films were not placed into evidence by either Petitioner or Respondent for the Arbitrator to review. Petitioner specifically denied bringing any 2013 or 2015 MRI's to Dr. Singh. (T.P. 37). Dr. Singh's report and addendum were lacking important details and consequently the Arbitrator finds that Dr. Singh's is not as credible a witness.

CONCLUSIONS OF LAW

The Arbitrator adopts and incorporates the above Findings of Fact and his comments regarding same into the Conclusions of Law sections herein.

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

The Arbitrator finds and concludes that there is a direct causal connection between the accident of Jan. 10, 2018 and Petitioner's current condition. This is based on Petitioner's testimony, her medical records and the deposition testimony of Dr. Dawish. Dr. Darwish acknowledged that Petitioner did not have a good result from her surgery but he also pointed out that bad results may happen in even the best of hands. (D.P. 29). There is no evidence of medical negligence and certainly no evidence of gross negligence that might cut off a causal

connection.

ISSUE: J: Were the medical services that were provided to Petitioner reasonable and necessary? Has respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds and concludes the medical services provided to Petitioner were reasonable and necessary. Respondent's section 12 witness Dr. Singh predicted that surgery would not have a good outcome. However, as discussed above the Arbitrator finds that Dr. Singh's opinion is not credible. Dr. Darwish explained that fusion surgeries do not always have a good result but fusion surgery is a standard and a reasonable way to address lumbar spondylolisthesis, low back pain and radiculopathy. (D.P. 28)

The Arbitrator finds and concludes Respondent has not paid all appropriate charges. Subject to the fee schedule, Respondent shall pay for the surgeries performed by Dr. Darwish and the hospitalization at Christ for management of pain control medications and all the attendant charges.

ISSUE: K: Is Petitioner entitled to any prospective medical care?

The Arbitrator finds and concludes Petitioner is entitled to have a spinal cord stimulator as recommended by Dr. Darwish (D.P. 21) and by Dr. Harsoor. This is necessary to deal with the pain caused by this admitted accident.

ISSUE: L: Is Petitioner entitled to Temporary Total Disability Benefits:

The Arbitrator awards TTD from the date of the accident Jan. 10, 2018 to the date of the hearing July 24, 2019.

The Arbitrator finds and concludes the medical records and Petitioner's testimony support her claim for TTD. The Arbitrator finds and concludes Petitioner did not take remove voluntarily out of the labor market. She had no choice but to retire in order to have some income after Respondent cut off her TTD. She specifically noted on her pension application form that she was applying for same only because her TTD had been terminated and she could not work and had no other income. (See exhibits 19, 20 and 21 and Petitioner's testimony T.P. 49-50.)

ISSUE: M: Should penalties and fees be imposed on respondent?

Petitioner is not awarded penalties or fees. Respondent purportedly relied on the opinions of its examining

Section 12 expert Dr. Singh to cut off TTD and deny medical. The Arbitrator finds this reliance was reasonable but only by the slimmest of margins.

Robert M. Harris

Signature of Arbitrator Robert M. Harris

Dated: October 3, 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CLAYTON ROGERS,

Petitioner,

vs. NO: 19 WC 26410

EHC INDUSTRIES,

Respondent.

21IWCC0023

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b-1) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, temporary total disability, medical 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 Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

At oral argument, Respondent moved to strike the Penalties argument in Petitioner's brief, contending the argument was not properly before the Commission because Petitioner did not file a Petition for Review, and the Motion was denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's oral motion to strike the penalties argument in Petitioner's brief is denied.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury, including but not limited to the credit awarded under case 19 WC 2641 given the Commission's conclusion that all periods of TTD are related to the December 31, 2018, accident and that the Petitioner's condition of ill-being is causally related to the undisputed December 31, 2018, date of accident.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $53,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 15 2021
KAD/bsd
O120820
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19 (b-1) ARBITRATOR DECISION

ROGERS, CLAYTON
Employee/Petitioner

Case# **19WC026410**
19WC026541

EHC INDUSTRIES
Employer/Respondent

21IWCC0023

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

Unless a party does the following, this decision shall be entered as the decision of the Commission:

1) Files a Petition for Review within 30 days after receipt of this decision; and

2) Certifies that he or she has paid the court reporter $ 650.00 for the final cost of the arbitration transcript and attaches a copy of the check to the Petition; and
3) Perfects a review in accordance with the Act and Rules.

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:

0274 HORWITZ HORWITZ & ASSOC LTD
STEVE COSTELLO
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

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

21IWCC0023

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b-1)

Clayton Rogers,
Employee/Petitioner
v.
EHC Industries
Employer/Respondent

Case # 19 WC 026410
Consolidated cases: 19 WC 026541

21IWCC0023

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **July 29, 2020**. Respondent filed a *Response* on **August 12, 2020**. The Honorable **Deborah J. Baker**, Arbitrator of the Commission, held a pretrial conference on **August 18, 2020**, and a trial on **August 31, 2020**, in the city of **Chicago**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 31, 2018**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**67,191.77**; the average weekly wage was $**1,825.86**.

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

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

Respondent shall be given a credit of $**14,872.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**14,872.00**.

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

ORDER

Petitioner's current condition of ill-being is related to the undisputed December 31, 2018 accident.

The arbitrator finds all periods of TTD to be related to the December 31, 2018 accident.

Petitioner's need for prospective medical treatment is related to the undisputed December 31, 2018 accident.

Respondent shall authorize and pay for prospective medical care as recommended by Dr. McComis in the form of an anterior cervical discectomy and fusion from C4 - C7 and post-operative care including physical therapy.

Respondent shall pay Petitioner temporary total disability benefits of $**1,217.24** /week for the periods of 2/4/19 through 5/17/19; and 7/24/19 through 8/31/20 representing 72-4/7 weeks as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $**20,640.16**, as provided in Sections 8(a) and 8.2 of the Act, and that all treatment is related to the accident of December 31, 2018.

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

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter $**650.00** or the ***final*** cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

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

Signature of Arbitrator

September 23, 2020
Date

SEP 24 2020

FINDINGS OF FACT

TESTIMONY OF PETITIONER, CLAYTON ROGERS

Petitioner, Clayton Rogers, testified that he lives in Hammond, Indiana and currently works for Respondent, EHC Industries (Transcript of Evidence at Arbitration, hereinafter "TA" at 15). Respondent performs environmental work, involving such items as asbestos, lead, and mold (TA at 15). Petitioner started working for Respondent in June of 1996 (TA at 15). Petitioner works for Respondent as an Asbestos Supervisor. (TA at 16). Petitioner is a member of Local Laborers Union No. 225. (TA at 16).

As part of his job duties, Petitioner would carry out negative air machines, tools, job boxes, buffers, and chemicals (TA at 16). Petitioner testified that the negative air machines weigh somewhere between one-hundred fifty (150) and two hundred (200) pounds each (TA at 17). The negative air machines have to be carried up flights of stairs and usually two men carry up the machines (TA at 18). As part of his job, he also carries chemicals in 5-gallon buckets and pulls job boxes full of tools (TA at 17). Tools Petitioner uses are buffers, grinders, and hammers (TA at 17, 18).

Treatment to Back and Neck Prior To Undisputed December 31, 2018

Prior to December 31, 2018, Petitioner never had upper back or cervical back treatment (TA at 26). Prior to December 31, 2018, Petitioner had medical treatment to his lower back (TA at 26). Treatment to Petitioner's lower back continued after his December 31, 2018 date of injury (TA at 27). Petitioner is not claiming that any lower back injury or lower back treatment is related to his current workers' compensation claim (TA at 27).

When asked about a chiropractic treatment note dated July 24, 2019, Petitioner testified that approximately twenty-five years ago, in the early 1990's, he was a derby car racer. (TA at 32). Petitioner testified that he had not raced a derby car from December 31, 2018 to the present. (TA at 33). Petitioner stated that since the date he was hired by Respondent in 1996, he has never sought treatment to his neck due to racing. (TA at 33). Petitioner testified that prior to December 31, 2018, his neck had never interfered with his ability to do his job for Respondent. (TA at 33).

Undisputed December 31, 2018 Date of Injury

The parties have stipulated that Petitioner sustained a work-related accident on December 31, 2018. On that day, Petitioner was sent by Respondent to the location of UOP in Des Plaines, Illinois for asbestos removal (TA at 18). While tearing down the containment, Petitioner went to move the negative air machines away from the poly (TA at 19). The bottom negative air machine was still taped to the poly, and the top negative air machine rolled off (TA at 19). Petitioner pushed the negative air machine, and as he went back, there were cords

laying on the ground, and Petitioner tripped over the cords, landing on his neck and his right shoulder on a set of temporary steps (TA at 19). Petitioner then felt a sharp pain through his neck that went down to his right shoulder and right arm (TA 20).

Petitioner reported the incident to Kevin Murray ("Mr. Murray"), Respondent's Safety Coordinator (TA at 20). Petitioner contacted Mr. Murray on January 6, 2019, and sent an accident report to Mr. Murray on January 7, 2019 (TA at 20, 52-53).

Medical Treatment Following the December 31, 2018 Injury

Petitioner testified that he first sought treatment on January 3, 2019 at Community Hospital and saw Dr. Maura Dickinson where he complained of neck pain and pain radiating into the right shoulder, and right shoulder weakness. (TA at 21, PX 15). Petitioner underwent a CT scan of his cervical spine (TA at 21, PX 14-15).

Petitioner testified that around February 2019, he sought treatment with Dr. Shanu Kondamuri with Midwest Interventional Spine Specialists. (TA at 22; PX 2). Dr. Kondamuri gave Petitioner work restrictions of no lifting over 10 pounds from February 4, 2019 through May 17, 2019 (TA at 25). On May 17, 2019, Dr. Kondamuri released Petitioner back to full duty work (TA at 23). It was noted that as of the time of his release, Petitioner was 80 to 100 percent better (TA at 23). Petitioner noticed that after his full duty release, he still had some pain and aching in his right shoulder and right arm (TA at 23). Upon return to work, Petitioner experienced aches in his neck and right arm when he was lifting and moving things (TA at 23-24).

Work Status Following the December 31, 2018 Injury

Following the December 31, 2018 work injury, Mr. Murray instructed Petitioner not to come back to work (TA at 24). From December 31, 2018 through May 17, 2019, Petitioner did not work, and was paid his full wages by Respondent (TA at 24). The parties stipulated to the appropriate TTD credit for this period.

After he was released to full duty work on May 17, 2019, Petitioner returned to work for Respondent in the same job position and job duties that he had prior to December 31, 2018 (TA at 26).

July 2, 2019 Date of Injury

On July 2, 2019, Petitioner was working for Respondent at Northern Illinois University in DeKalb, Illinois (TA at 28). On that day, Petitioner was removing six (6) windows or six (6) doors made of aluminum and glass in addition to the glass around the doors, the aluminum framing, and asbestos caulk (TA at 28). Petitioner requested that one of his workers pick the doors up and set them on a wall (TA at 28). As the worker was having a hard time with this request, Petitioner went over to help him with the doors (TA at 28). The doors were approximately eight (8) feet high and 36 inches wide, weighing roughly 150 pounds each (TA at 28-29).

Petitioner picked up a door, carried it approximately ten (10) feet to place it against a wall, but then started feeling pain in his neck and down his shoulder and right arm (TA at 29).

The job assignment at Northern Illinois University was a three-day job, so Petitioner returned the next day to finish the job (TA at 29). On that day, Petitioner worked on tearing down and loading the truck, and felt severe pain (TA at 30). Petitioner's brother had to drive him home (TA at 30).

When asked about how his cervical or upper back complaints from December 31, 2018 differed from his cervical or upper back complaints from July 2, 2019, Petitioner testified that the pain was much more severe, "like a burning. There was a tingling in [his right] arm." (TA at 30). The pain was located in the same location as before July 2, 2019. (TA at 30).

Petitioner contacted Mr. Murray on approximately July 5 or 6, 2019 to report the injury that occurred on July 2, 2019. (TA at 31). Petitioner testified that he "let him [Kevin Murray] know what happened again." (TA at 31).

Work Status and Benefits Paid Following July 2, 2019

Petitioner testified that around September 12, 2019, Respondent stopped paying Petitioner his full salary and began paying him temporary total disability benefits of $1,199.00 per week. (TA at 35).

Between July 2, 2019 and September 12, 2019, Mr. Murray told Petitioner that he did not have to come back to work and Respondent continued paying Petitioner his salary and full benefits (TA at 35-37). During this time, Respondent continued to submit Petitioner's union credits for health insurance and retirement benefits (TA at 37).

During the time when Petitioner was released to work with light duty restrictions, he would have returned to work per the light duty restrictions had he been offered light duty work by Respondent (TA at 37).

No one from Respondent ever told Petitioner that his July 2, 2019 accident was disputed or denied (TA at 37).

Medical Treatment

Petitioner sought treatment from chiropractor Randy Rosenthal of Elite Chiropractic on July 24, 2019 (TA at 32, 34). Petitioner sought treatment with the chiropractor after the suggestion was made by Mr. Murray that Petitioner should visit a chiropractor (TA at 34). Petitioner had never visited with a chiropractor in the past (TA at 34). Petitioner underwent chiropractic care for his right shoulder and right arm from July 24, 2019 through August 15, 2019 (TA at 34).

Petitioner began treating with Dr. Gregory McComis on September 26, 2019 (TA at 38). Dr. Kondamuri gave Petitioner an Epidural Steroid Injection (ESI) and released Petitioner back to work with restrictions (TA at 39). Petitioner testified that during physical examinations by Dr. Kondamuri, Dr. Kondamuri would push down on Petitioner's head, which would cause Petitioner to feel pain down through his neck and right shoulder (TA at 44).

On October 31, 2019, Petitioner returned to visit Dr. McComis, who revised Petitioner's restrictions. (TA at 39-40). Dr. McComis recommended that Petitioner undergo surgery, specifically a cervical discectomy and fusion from C4-C7. (TA at 40). Petitioner currently has work restrictions of no lifting, pushing, or pulling more than twenty pounds. (TA at 40).

Return to Work in November of 2019

Petitioner returned to work for Respondent in November of 2019, and he worked four hours per day for four days (TA at 40). Petitioner worked in the warehouse cleaning vacuums and negative air machines (TA at 40). Petitioner noticed after that period of time, he was sore, and his neck and right arm were achy (TA at 40-41). Petitioner was to return to work the following weekend, but he testified that he was "hurting bad" and called Mr. Murray (TA at 41). Mr. Murray told Petitioner that the boss at Respondent didn't want to pay Petitioner that kind of money for four hours when they didn't have work for him (TA at 41).

Section 12 Evaluation at Respondent's Request by Dr. Kern Singh

On February 10, 2010, at Respondent's request, Petitioner was examined by Dr. Kern Singh (TA at 42). Petitioner testified that Dr. Singh probably spent five or six minutes with Petitioner (TA at 42). Dr. Singh performed a physical examination where he "checked" Petitioner's arms (TA at 42-43). During the examination, Dr. Singh did not physically push down on Petitioner's head (TA at 42-43). Dr. Singh had an assistant with him during the examination, but that assistant did not perform any test upon Petitioner or push down on Petitioner's head (TA at 45).

Time Off Work Following the July 2, 2019 Date of Injury

Petitioner was either off work completely, or given a 20-pound pushing, pulling, and lifting restriction from July 24, 2019, through the present time (TA at 47).

Second Opinion with Dr. Joseph Spott and Future Treatment

Petitioner returned to see Dr. McComis on June 4, 2020, who continued to recommend surgery consisting of an anterior cervical discectomy and fusion from C4 through C7 (TA at 46). Dr. McComis referred Petitioner to see Dr. Joseph Spott for a second opinion (TA at 46).

On June 23, 2020, during Petitioner's appointment with Dr. Spott, pushed down on Petitioner's head, causing pain through his neck and right shoulder and right arm (TA at 44-45,

46-47). Following the examination, Dr. Spott recommended surgical intervention (TA at 47, PX 11).

Petitioner is scheduled for an office visit with Dr. McComis on September 8, 2020 (TA at 47). The surgery recommended by and to be performed by Dr. McComis, has been scheduled for September 23, 2020 (TA at 48). Petitioner desires to have this surgery, and testified that he wants the surgery, "[b]ecause I've tried everything I can do, and nothing – it's still there, the pain." (TA at 48). Petitioner testified that he has not undergone the surgery because the surgery has not been authorized By Respondent. (TA at 50). Petitioner described his pain as sharp, and sometimes burning down through the neck and to the right shoulder with tingling (TA at 48). There is also tingling in Petitioner's right hand (TA at 48-49). Petitioner has not seen improvement in his complaints since his July 2, 2019 date of injury (TA at 49). Petitioner cannot pick up anything heavy and he watches TV a lot (TA at 49). Petitioner can help his wife unload the dishwasher and is able to drive a car, but he is bothered after about one hour (TA at 49-50).

Petitioner is not retired, but before his work accident of December 31, 2018, he was thinking of retiring in April of 2020 (TA at 50-51). Petitioner testified that since he has missed quite a bit of work since December 31, 2018, he is thinking about continuing to work so that he can get more credits for his union pension before he retires (TA at 51).

Other than the injuries of December 31, 2018 and July 2, 2019, Petitioner has not suffered injuries to his neck after those specific injury dates (TA at 52). Petitioner has not been in any car accidents or sustained any other injuries after December 31, 2018 and July 2, 2019 (TA at 52).

CROSS-EXAMINATION OF PETITIONER

On cross-examination, Petitioner testified that it's normal for him to fill out an accident report if an employee sustains a work accident because he is the supervisor (TA at 53-54). An injured employee also fills out a form (TA at 54). It is regular practice to fill out a form for every injury occurring (TA at 54). Petitioner would usually give the completed report to Mr. Murray, Respondent's employee. (TA at 54). Petitioner did not fill out a form (accident report) for his July 2, 2019 date of injury (TA at 55). Instead, Petitioner called Mr. Murray to report his injury (TA at 55).

Petitioner went to the emergency room after his December 31, 2018 injury, but did not go to the emergency room after his July 2, 2019 date of injury (TA at 55).

From approximately 1976 until about 1992, Petitioner participated in demolition derbies, where you "race cars and smash into each other" at local county fairs. (TA at 56-57). When Petitioner first started, he raced about once per year, but eventually he began racing at local county fairs and his racing increased to approximately five to six races per year (TA at 57). Petitioner would get into collisions at these races (TA at 57).

When asked what a Spurling test is, Petitioner testified that "It's pushing on your head. I'm not a doctor. I don't really know." (TA at 57). Petitioner testified that when a doctor performs a Spurling test, he knows that he is supposed to feel pain in his neck and shoulder and arm because he felt pain when the test was performed on him. (TA at 58).
No one told Petitioner to look out for this test and Petitioner did not know that there are 6 different ways to perform a Spurling exam (TA at 59). Petitioner testified that Dr. Singh, during his examination, may have moved Petitioner's head sideways (TA at 60).

When Petitioner saw Dr. McComis on September 26, 2019, Petitioner told Dr. McComis that the chiropractic treatment form Chiropractor Rosenthal did not help (TA at 62). When asked about an initial chiropractic record, which states that Petitioner first had 6 out of 10 pain for 76 to 100 percent of the time, Petitioner testified that it sounded correct (TA at 62). When asked about a chiropractic record from his last visit in August 2019, which states that Petitioner had 2 out of 10 pain that was present 0 to 25 percent of the time, Petitioner testified that it was "kind of an improvement." (TA at 63).

Petitioner testified that he told Chiropractor Rosenthal that he lifted doors on July 2, 2019 and felt pain, and if the records state that he had pain in his neck after falling at work a couple days before the visit, the chiropractor's records are incorrect and Chiropractor Rosenthal "got that mixed up." (TA at 66). Petitioner testified that he did not sustain a fall at work on or about July 20, 2019 (TA at 68). The medical records from Chiropractor Rosenthal which reflect complaints of pain radiating only into his shoulder and not into his arm or elbow, would not be correct (TA at 68).

Petitioner agreed that when Petitioner visited Dr. Kondamuri on September 12, 2019, Petitioner reported severe pain in his neck, and Dr. Kondamuri prescribed injections (TA at 69-70). Petitioner testified that he could perform his full duties for his heavy-duty job from May 2019 through July 2019 (TA at 70). Petitioner acknowledged that he has a history of lower back problems and that he had been recommended for a spinal cord stimulator for his low back. (TA at 70).

When asked about a reference in Dr. McComis' records to Petitioner feeling better since being off work due to COVID, Petitioner testified that this was incorrect, and he was not working anytime in March 2020 (TA at 71).

Petitioner testified that he is putting his upcoming surgery through his group insurance carrier because Respondent denied his workers' compensation claim. Petitioner testified that he could not have had surgery in March 2020 due to "the virus." (TA at 75).

REDIRECT EXAMINATION OF PETITIONER

On redirect examination, Petitioner testified that no accident report was created by Petitioner following his July 2, 2019 accident as Respondent did not request Petitioner provide an accident report (TA at 76-77). Petitioner testified that he did not report to the emergency

room following his July 2, 2019 date of accident as Mr. Murray sent Petitioner some information about chiropractors and suggested he try a chiropractor. (TA at 77).

When asked about visiting Dr. Singh for a Section 12 examination, Petitioner stated that Dr. Singh "had me go back, side to side." (TA at 78). Petitioner testified that has not been working during COVID or any other time he was not supposed to be working (TA at 80-81).

MEDICAL RECORDS and TREATMENT

Medical Treatment Following the December 31, 2018 Date of Injury

Petitioner first sought treatment on January 3, 2019 at Community Hospital and saw Dr. Maura Dickinson where he complained of neck pain and pain radiating into the right shoulder, and right shoulder weakness. (TA at 21, PX 15). Petitioner underwent a CT scan of his cervical spine (TA at 21, PX 14-15).

On January 12, 2019, Petitioner underwent a cervical spine MRI. The radiologist findings indicated severe, right greater than left, foraminal narrowing at C4-C5 due to posterior osteophyte disc complexes/disc protrusion; left-sided posterior osteophyte disc complexes/disc protrusion at C5-C6 with significant narrowing of the left neural foramen; narrowing of C4-C7 disc spaces; and multilevel spondylosis. (PX 7, 15, 16).

On February 4, 2019, Petitioner treated with Dr. Kondamuri, to whom Petitioner had been referred by his primary care physician. Dr. Kondamuri gave Petitioner a 10-pound lifting restriction and prescribed physical therapy (TA at 21; PX2).

Petitioner sought treatment with his primary doctor, Dr. Kondamuri, on February 11, 2019 (PX 2). Dr. Kondamuri noted that Petitioner fell on December 31, 2018 at work landing backward on his right upper back, shoulder, and neck striking a set of moveable stairs (PX 2). Since that date, Petitioner has had right sided cervical pain, right posterior shoulder pain, and pain into the right triceps area, along with occasional tingling in the 3rd and 4th digits of the right hand (PX 2).

On May 17, 2019, Petitioner returned to Dr. Kondamuri who noted that Petitioner had three to four days of excellent pain relief following the March 1, 2019 ESI, 50-75% relief after the second ESI on March 20, 2019, and 80-100% pain relief following the third ESI on May 2, 2019. Dr. Kondamuri opined that Petitioner had reached MMI and could return to work full duty without restrictions. (TA at 23; PX 2).

Medical Treatment Following the July 2, 2019 Date of Injury

On July 16, 2019, Petitioner was evaluated by Nurse Practitioner Kathryn Trojan who, based on the records, appears to have worked in the same practice group at Midwest Interventional Spine Specialists as Dr. Kondamuri. The progress note indicates "Patient re-

injured at work 7/3/19 when lifting doors." The progress note indicates that Petitioner was taking prescription pain medication for an unrelated lower back condition. (PX 2)

On July 24, 2019, Petitioner treated with chiropractor Randy Rosenthal with Elite Chiropractic & Sports Care. Petitioner complained of right neck pain, neck tightness, and shoulder tightness. Petitioner reported that the pain radiated to the right shoulder and was rated 6 out of 10 on a 10-point scale. Chiropractor Rosenthal found spinal segment dysfunction at C4, C5, C6, T2 and T4. Chiropractor Rosenthal noted that "with his unfortunate events in his life (derby car racer) that the degenerative properties in his spine are the true cause of his condition." (PX 12).

On July 31, 2019, Petitioner returned to Chiropractor Rosenthal and noted that his pain was rated 3 out of 10 although he continued to complain of right neck pain, neck tightness, and shoulder tightness. On August 5, 2019, Petitioner followed up with Chiropractor Rosenthal and reported pain rated 2 out of 10 but noted that his right scapula was bothering him. On August 7, 2019, Petitioner returned to Chiropractor Rosenthal and noted that his pain was rated 1 out of 10 and he was continually feeling better in the neck and shoulder. On August 8, 2019, Petitioner followed up with Chiropractor Rosenthal and reported that his pain was rated 3 out of 10. Petitioner indicated that he was feeling worse. On August 12 and 15, 2019, Petitioner returned to Chiropractor Rosenthal and noted that his pain was rated 2 out of 10. (PX 12). Petitioner underwent chiropractic care for his right shoulder and right arm from July 24, 2019 through August 15, 2019 (TA at 34; PX 12).

On September 12, 2019, Petitioner followed-up with Dr. Kondamuri. Petitioner presented with "right sided neck pain due to a lifting injury while working on 7/2/19." Dr. Kondamuri noted that Petitioner had moderate to severe pain necessitating interventional pain management, diagnosed Petitioner with radiculopathy of the cervical region, and recommended that Petitioner undergo an ESI to C6-C7. Dr. Kondamuri placed Petitioner off work and referred Petitioner to Dr. McComis with a diagnosis of cervical radiculopathy. (TA at 35; PX 2; PX 4). Petitioner underwent ESI injections to C6-C7 on September 27, 2019 and October 30, 2019. (PX 2)

Petitioner first visited Dr. Gregory McComis on September 26, 2019 (TA at 38; PX 7). Petitioner reported sustaining a work injury to his neck and right shoulder on December 31, 2018 for which he underwent injections that helped. The progress note states: "States 7/2/19 he was at work and picked up a set of doors and had severe pain in his neck and down his right shoulder and upper arm. States right arm has tingling on and off." Petitioner reported that he initially injured his neck and right shoulder on December 31, 2018 and that he had been treating with a chiropractor which did not help. Dr. McComis noted that Petitioner was already taking prescription pain killers for an unrelated lower back condition. Dr. McComis reviewed a cervical spine MRI that revealed a herniated disc on the right side at C4-5, Bone-on-bone at C5-C6 with left foraminal stenosis, and bone-on-bone at C6-C7 with bilateral foraminal stenosis. Dr. McComis diagnosed Petitioner with a herniated cervical disc, cervical radiculopathy, and

cervical spondylosis. Dr. McComis opined that "his problem is the herniated disc at C4-C5 and I would recommend that he undergo ACDF at C4-C5." (PX 7; TA at 39)

On September 27, 2019, Dr. Kondamuri gave Petitioner an epidural steroid injection at C6-7 to treat cervical radiculopathy, cervical spinal stenosis and a cervical herniated disc. (TA at 39, PX 2).

On October 10, 2019, Petitioner followed up with Dr. Kondamuri, who released Petitioner back to work with restrictions of no lifting, pushing, or pulling over 20 pounds (TA at 39). Petitioner still had symptoms in his neck and right arm (TA at 39; PX 5).

On October 31, 2019, Petitioner returned to visit Dr. McComis and reported that the second ESI had not helped and he experienced numbness and tingling down his hand. Dr. McComis released Petitioner to work with a 20-pound weight restriction and recommended that Petitioner undergo a cervical discectomy and fusion from C4-C7. (PX 7; TA at 40).

On November 14, 2019, Dr. Kondamuri noted that Petitioner had improved approximately 50% from the second ESI but Petitioner still had residual pain. Dr. Kondamuri recommended that Petitioner pause injections for three months, restart physical therapy, and return to Dr. McComis. Dr. Kondamuri continued Petitioner's work restrictions of no lifting, pushing, or pulling over twenty pounds. (PX 2; PX 6).

On December 5, 2019, Dr. McComis reevaluated Petitioner and opined that conservative treatment had failed. Dr. McComis recommended that Petitioner undergo an anterior cervical discectomy and fusion from C4-C7 and subsequent physical therapy. (PX 7) Dr. McComis placed Petitioner off work. (TA at 41-42; PX 9).

On March 24, 2020, Petitioner visited Dr. McComis, who placed Petitioner off work (TA at 45-46; PX 7; PX 9).

Petitioner returned to see Dr. McComis on June 4, 2020, who continued to recommend surgery consisting of an anterior cervical discectomy and fusion from C4 through C7 (TA at 46). Dr. McComis referred Petitioner to see Dr. Joseph Spott for a second opinion and kept Petitioner off work (TA at 46; PX 8, PX 9, PX 10).

On June 23, 2020, Petitioner saw Dr. Spott with Superior Orthopedics. The progress note indicates that Petitioner reported falling back into steps and hitting his right-side neck and right shoulder at work on December 31, 2018. Petitioner also indicated that he reinjured his cervical spine on "6/2/2019" when he was carrying a door and hit his neck while it was falling back. Dr. Spott noted that chiropractic care and two injections did not help. Subsequently, Dr. Spott noted that Petitioner reported that the injections helped the first time around. Dr. Spott diagnosed Petitioner with cervical disc disorder at C4-C5 with radiculopathy and recommended that Petitioner undergo surgery to C4-C5. (TA at 47, PX 11; PX 12).

DEPOSITION TESTIMONY

DEPOSITION OF DOCTOR GREGORY MCCOMIS

DIRECT EXAMINATION OF DR. MCCOMIS

On direct examination, Dr. Gregory McComis testified by way of an evidence deposition on May 8, 2020. (PX 18 at 4). Dr. McComis is a board-certified orthopedic surgeon with a focus on spine surgery (PX 18 at 6). Dr. McComis has been retained by both plaintiff and defense firms for independent medical exams (PX 18 at 9).

Dr. McComis first saw Petitioner on September 26, 2019 by referral from Dr. Kondamuri (PX 18 at 13). During that visit, Dr. McComis determined that Petitioner had limited rotation to the right and a positive Spurling's sign and weakness in his right biceps which is C5 (PX 18 at 14). Furthermore, Dr. McComis testified x-rays showed "some mild degenerative changes at C3-4 and C4-5. Then he had moderate degenerative changes at C5-6. And then he was bone on bone at C6-7, so that disk had completely worn out." (PX 18 at 14).

Dr. McComis reviewed the MRI of January 12, 2019 which "showed a disk herniation on the right side at C4-5, and then he was bone on bone at C5-6 with left foraminal stenosis and bone on bone C6-7 with bilateral foraminal stenosis." (PX 18 at 15). Dr. McComis diagnosed Petitioner with "cervical radiculopathy and a herniated cervical disk and then cervical spondylosis" and recommended surgery at C4-5 as Petitioner had exhausted "all nonoperative treatment" (PX 18 at 15). Dr. McComis opined that the only way for the Petitioner to get pain relief is to have surgery as the symptoms and clinical findings "correlate perfectly with the disk herniation at C4-5." (PX 18 at 16).

Dr. McComis further testified that he asked Dr. Jayesh Thakrar, a fellowship-trained musculoskeletal radiologist that Dr. McComis is familiar with and trusts as a radiologist, to read Petitioner's MRI results (PX 18 at 17). Dr. McComis testified that he and Dr. Thakrar arrived at the same diagnosis, that Petitioner had a herniated disk (PX 18 at 18). Dr. McComis explained that a disk protrusion is a different descriptive term for a disk herniation and that some doctors use these terms interchangeably. (PX 18 at 19).

Dr. McComis recommended a discectomy and surgical fusion from C4-7 after his October 31, 2019 office visit, because "if you do a cervical discectomy and fusion at one level, you put the adjacent level at risk for developing problems (PX 18 at 20-22).

When asked whether he had an opinion to a reasonable degree of medical and surgical certainty as to whether the three-level fusion that he recommended for Petitioner was reasonable and necessary, Dr. McComis testified that the surgery was reasonable and necessary. (PX 18 at 22).

Further, Dr. McComis opined that the first accident of December 31, 2018, which is described in the accident report and the Petitioner's account of the accident, would be the type of injury to cause a disk herniation (PX 18 at 24). Petitioner had pre-existing degenerative changes at C5-6 and C6-7 which Dr. McComis attributed some of his symptoms to; however, he testified that he was "very confident that the C4-5 disk herniation is an acute problem leading to his radicular symptoms in his arm and neck." (PX 18 at 25).

Regarding causation and the second accident of July 2, 2019, Dr. McComis testified that Petitioner was doing heavy labor again which caused a re-aggravation of the December 31, 2018 injury to the same disk "and that's what puts him at the point where he is now." (PX 18 at 24). The need for treatment in the other two cervical spine levels (C5-6 and C6-7) would also be related to the work injury. Dr. McComis opined that it was more likely than not that Petitioner injured the other cervical spine levels at the time of the injury, however, it was his opinion that he needed to include the other levels in the surgical fusion because it is common for patients who undergo a one-level fusion to develop "adjacent level disease" in the non-fused levels due to the one-level fusion, which would require a second surgical procedure. (PX at 25-26).

When asked whether the multi-level fusion surgery of the neck he is recommending is related to one or both of the accidents, Dr. McComis testified that he would relate the need for surgery to both of the accidents (PX 18 at 25).

Dr. McComis testified that "any sharp blow or... just a stress on his ... neck could have caused this herniation on the right side." (PX at 27). Dr. McComis testified Petitioner's treatment has been medically necessary and reasonable. (PX at 30).

Dr. McComis next testified as to the Section 12 examination report of Dr. Singh, who was retained as an expert for Respondent. Dr. McComis testified about inconsistencies between his exam findings and Dr. Singh's exam findings. (PX 18 at 31). Dr. McComis did not agree that Petitioner did not have loss of sensation as he found Petitioner had a little bit of decreased sensation in the right hand on March 24, 2020. Decreased sensation is part of radiculopathy. (PX 18 at 31-32). He also disagreed with Dr. Singh regarding Petitioner's range of motion, as Dr. Singh indicated Petitioner had full range of motion (PX 18 at 33). Dr. McComis found that Petitioner had decreased range of motion at both the December 5, 2019 visit and the March 24, 2020 visit. Dr. McComis testified that Petitioner never had full range of motion of the neck during any exam. (PX 18 at 32). Dr. McComis testified that a Spurling test is done when looking for signs of radiculopathy and Petitioner had had positive Spurling's signs consistently. (PX 18 at 34). Dr. McComis testified that "you have to push down on the patient's head in order to get a test for a Spurling's sign." (PX 18 at 35).

Dr. McComis testified that Dr. Singh's findings of a normal physical exam were inconsistent with his examination findings. (PX 18 at 33-35). Further, Dr. McComis testified that he disagreed with Dr. Singh's diagnosis of a cervical strain, as a cervical strain will typically resolve in a matter of weeks or maybe in a month or two (PX 18 at 36-37).

Dr. McComis testified it would be a mistake for Petitioner to return to work prior to surgery based on his re-injury on July 2, 2019. (PX 18 at 37-38). Dr. McComis testified Petitioner is not at MMI. (PX 18 at 41).

CROSS-EXAMINATION OF DR. MCCOMIS

On cross-examination, Dr. McComis testified that he is licensed to practice in Indiana but not Illinois (PX 18 at 44-45). Dr. McComis testified he did not review medical records from Dr. Oetter (PX 18 at 46). He agreed that the first time he saw Petitioner was September 26, 2019, about nine to ten months after the first accident and about ten weeks after the second accident (PX 18 at 47-48). Dr. McComis testified that Petitioner's symptoms could be related to his pre-existing condition but his pre-existing condition probably could have been aggravated by his fall also. (PX 18 at 52). Dr. McComis agreed that no MRI is available after the July 2019 accident and therefore it is not known whether or not the Petitioner's "physical structures have changed." (PX 18 at 54). Dr. McComis testified that he did not know whether Petitioner had been working in any capacity in March 2020. (PX 18 at 56).

Dr. McComis testified that his exam findings are objective and referenced a note where Petitioner did not have weakness of his biceps, whereby the nerve root could have been less irritated at that time and that's why "the motor exam changed." (PX 18 at 60-61). He testified "the Spurling's sign is consistent throughout my entire exam." (PX 18 at 61). Dr. McComis testified that normal extension, flexion, and rotation is relative to age; necks tend to be stiffer as people age (PX 18 at 63). Dr. McComis testified that since Petitioner has arthritic changes in the neck, he's got a relatively stiff neck and can only extend five degrees, with typical extension being at least 15 to 20 degrees (PX 18 at 63-64). Dr. McComis agreed that he could determine Petitioner was a surgical candidate after one exam, and that, hypothetically, "exam findings can change over time (PX 18 at 65).

RE-DIRECT EXAMINATION OF DR. MCCOMIS

On redirect examination, Dr. McComis testified that chiropractic treatment was reasonable treatment after the July accident (PX 18 at 67). He also agreed that some of the loss of motion in Petitioner's neck is related to his disk herniation (PX 18 at 68).

DEPOSITON OF DR. KERN SINGH

DIRECT EXAMINATION OF DR. SINGH

Dr. Kern Singh testified by way of an evidence deposition on June 3, 2020 (RX 1 at November 16, 2016. (RX 1 at 2). On direct examination, Dr. Singh testified that he is Board Certified by the American Board of Orthopaedic Surgery and his practice consists of treating patients with spinal disorders (RX 1 at 5). Dr. Singh took a history from Petitioner of two separate injuries; one on December 31, 2018 and the second on July 2, 2019 (RX 1 at 8). Dr.

Singh testified that Petitioner's history of low back problems, long-term opioid use and chronic pain was significant in developing his findings. (RX 1 at 9).

Dr. Singh testified that when he saw Petitioner in February of 2020, Petitioner stated that he had neck pain, anywhere from a 5 to 9 out of 10, and he had entire right arm pain into the elbow (RX 1 at 12).

Dr. Singh testified that he performed a physical examination of Petitioner at the time of his examination (RX 1 at 14). Dr. Singh explained under direct examination, that a Spurling sign is a test for possible cervical radiculopathy, involving downward pressure on top of the head and then rotation of the patient to the side of the pain, and it closes down the nerve root foramen, causing irritation to the nerve root, potential, into the arm (RX at 14).

Dr. Singh reviewed the images from the January 12, 2019 cervical spine MRI that he interpreted as revealing diffuse degenerative changes in particular at C5-6 and C6-7 with a loss of disc signal intensity, and collapse of the disc space at C5-6 and C6-7 with mild neural foraminal stenosis (RX 1 at 15). Mild neural foraminal stenosis means there is some narrowing of where the nerve root exits at the C5-6 and C6-7 levels (RX 1 at 15-16).

To a reasonable degree of medical and surgical certainty, Dr. Singh diagnosed Petitioner with cervical musculature strain and C5-6 and C6-7 degenerative disease, and felt that Petitioner sustained a soft tissue strain of his cervical spine which had resolved (RX 1 at 16). Dr. Singh testified there was radiographic evidence of disc degeneration at C5-6 and C6-7 but Dr. Singh felt Petitioner was asymptomatic as he could not correlate any examination findings with it. (RX 1 at 16). Dr. Singh opined that the MRI findings showed "age-appropriate degenerative changes." (RX 1 at 17). Dr. Singh testified that four weeks of physical therapy three times per week was appropriate and reasonable (RX 1 at 17). Dr. Singh believed Petitioner could return to his full duty job as related for both his December 31, 2018 work injury and his July 2, 2019 incident (RX at 18).

When asked on direct examination about his addendum report from May 30, 2020, Dr. Singh had written the Addendum after taking a second look at the MRI, and Dr. Singh did not appreciate any disc herniation at C4-5 (RX 1 at 18-20). Dr. Singh believed the disc herniation at C4-5 is part of what he believes to be a diffuse degenerative process s with no overt disc herniation present (RX 1 at 20).

CROSS-EXAMINATION OF DR. SINGH

On cross-examination, Dr. Singh testified that he performs four to six examinations of litigated matters each week, and is hired by Respondents 65 to 70 percent of the time (RX 1 at 22-23).

Dr. Singh agreed that Petitioner had a positive response to three epidural injections that allowed Petitioner to go back to full duty work (RX 1 at 26). Dr. Singh agreed that the physical

therapy and cervical epidural steroids provided were successful in treating the symptoms of a cervical radiculopathy from January to May 17, 2019 and was reasonable, necessary, and related to the accident of December 31, 2018 (RX 1 at 26-27).

Dr. Singh had never been supplied the accident report where Petitioner fell down the stairs, struck his head, injured his neck on December 31, 2018, and that falling down and injuring your neck can herniate a disc in the neck (RX 1 at 27-28). In addition, the fall could also aggravate or make painful a degenerative disc disease in Petitioner's neck, at C4-5, C5-6, and C6-7 (RX 1 at 46).

Dr. Singh testified that he was not provided with the January 3, 2019 records from Community Healthcare System. (RX 1 at 28).

When asked about Petitioner's July 2, 2019 date of injury, Dr. Singh admitted that lifting a heavy door is a way to injure the neck and is a possible mechanism of injury (RX 1 at 30). In addition, Petitioner's July 2, 2019 lifting episode theoretically could have aggravated a degenerative disc disease at C4-5, C5-6, and C6-7 (RX 1 at 46).

Dr. Singh admitted that his summary omitted the Dr. McComis finding of a positive Spurling and biceps weakness 4/5, and motor weakness on exam on external rotation of the right shoulder, and that those findings could be consistent with a cervical radiculopathy (RX 1 at 32).

Dr. Singh opined that if Petitioner has C5 weakness, biceps weakness, he has a biceps reflex loss, then a C5 ACDF – C4-5 ACDF would be appropriate and reasonable (RX 1 at 34-35).

Dr. Singh testified further that he did not find any signs of symptom magnification on his examination (RX 1 at 42).

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? (19WC026541)

D. What was the date of the accident? (19WC026541)

The Arbitrator finds that Petitioner sustained a work-related accident that arose out of and in the course of Petitioner's employment with Respondent on July 2, 2019.

In order to recover benefits under the Illinois Workers' Compensation Act, a claimant bears the burden of proving that his injury arose out of an in the course of his employment *McAllister v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 162747WC, 2019 Ill. App. LEXIS 339. The occurrence of an accident at the claimant's workplace does not automatically establish that the injury "arose out of" the claimant's employment. *Id.* at P24.

Petitioner has been working for Respondent since 1996 and is currently working as an Asbestos Supervisor. The parties have stipulated that Petitioner sustained a work-related accident on December 31, 2018 (case no. 19WC026410).

Respondent placed the second accident of July 2, 2019 in dispute at arbitration (case no. 19WC026541). Petitioner testified that on July 2, 2019, he was assigned to work at Northern Illinois University for Respondent when he felt pain in his neck that traveled down to his right shoulder and right arm as he helped a coworker to lift some doors that were eight feet tall, thirty-six inches wide, and weighed approximately 150 pounds each. Petitioner returned to the same job site the next day (July 3, 2019) to complete the three-day job assignment where he worked on tearing down and loading the truck. The same day (July 3, 2019), Petitioner began to experience severe pain, to the point where his brother had to drive him home.

When asked about how his cervical or upper back complaints from December 31, 2018 differed from his cervical or upper back complaints from July 2, 2019, Petitioner testified that the pain was much more severe, "like a burning. There was a tingling in [his right] arm." Petitioner testified that the pain was located in the same location as before July 2, 2019. (TA at 30).

Petitioner testified that Mr. Murray, Respondent's Safety Coordinator, instructed him to stay home and sent Petitioner information about chiropractic treatment as Petitioner had never treated with a chiropractor before. Petitioner also testified that Mr. Murray did not ask Petitioner to complete an accident report. The medical records show that on July 16, 2019, Petitioner presented to Midwest Interventional Spine Specialists where he was already treating for his unrelated lower back condition, and on that day, Nurse Trojan documented that Petitioner reinjured his neck at work on "7/3/19" when lifting doors. (PX 2)

The Arbitrator finds that the description of the accident just a few weeks after it occurred is consistent with Petitioner's testimony despite the date of accident typographical error which incorrectly indicates that the accident occurred on July 3, 2019 instead of July 2, 2019. The Arbitrator finds further that the short period of time between the date of accident and Petitioner's first visit at Midwest Interventional Spine Specialists after July 2, 2019 does not undermine Petitioner's credibility. Additionally, the Arbitrator finds it significant that Petitioner had already been prescribed pain medication for his unrelated lower back condition at the time of the July 2, 2019 accident.

The Arbitrator finds that Petitioner testified credibly as to the events that occurred on July 2, 2019 and Respondent called no witnesses to dispute Petitioner's testimony. Additionally, the Arbitrator finds that Petitioner's testimony is supported by the medical records. Accordingly, the Arbitrator finds that Petitioner sustained an accident which arose out of and in the course of his employment on July 2, 2019.

E. Was timely notice of the accident given to Respondent? (19WC026541)

The Arbitrator finds that timely notice of the accident was given to Respondent on approximately July 5 or 6, 2019. The unrebutted testimony of Petitioner is that he called Respondent's safety coordinator, Kevin Murray, on approximately July 5 or 6, 2019 to report the neck injury that occurred on July 2, 2019 (TA at 31). No accident report was created by Petitioner following his July 2, 2019 accident, as Respondent did not request Petitioner to provide an accident report. Further, the Arbitrator notes that Petitioner testified that nobody from Respondent ever told him that his July 2, 2019 accident was disputed or denied. (TA at 37). Therefore, the Arbitrator finds that Petitioner gave Respondent timely notice of his July 2, 2019 accident.

F. Is Petitioner's current condition of ill-being causally related to the injury? (19WC026410 & 19WC026541)

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the undisputed accident of December 31, 2018. The Arbitrator finds Petitioner's testimony credible and consistent with the medical records. Further, the Arbitrator finds the opinions of Dr. McComis to be more credible and persuasive than the opinions of Dr. Singh.

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

Furthermore, it has long been held that "a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64 (1982). "When the claimant's version of the accident is uncontradicted and his testimony is unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award. *Id.* at 64.

On February 11, 2019, Dr. Kondamuri noted that Petitioner fell on December 31, 2018 at work landing backward on his right upper back, shoulder, and neck striking a set of moveable stairs (PX 2). Since that date, Petitioner has had right sided cervical pain, right posterior

shoulder pain, and pain into the right triceps area, along with occasional tingling in the 3rd and 4th digits of the right hand (PX 2).

Following the July 2, 2019 accident Petitioner was directed by Respondent to stay home while they paid him full salary. At the direction of Respondent, Petitioner tried chiropractic care in July of 2019 and August of 2019 which did not provide lasting relief. Petitioner then returned to Dr. Kondamuri who referred Petitioner to Dr. McComis. Dr. McComis opined in his deposition that he would relate the need for surgery to both of the accidents (PX 18 at 25). Additionally, the medical records reflect Petitioner has consistently complained of similar neck and right arm pain following both injuries at work. Petitioner testified that while he had returned to work in a full duty capacity for Respondent following his May 17, 2019 release by Dr. Kondamuri, he was only 80 to 100 percent better (TA at 23). Following his full duty release, Petitioner still had pain and aching in his right shoulder and right arm, and that upon returning to work, Petitioner experienced aches in his neck and right arm when he was lifting and moving things (TA at 23-24).

The Arbitrator gives the chiropractic note dated July 24, 2019, no weight as the note does not state when Petitioner raced derby cars and the chiropractor never reviewed the MRI or any other diagnostic testing. Further, Petitioner credibly testified that he has not raced derby cars since the early 1990's and he has performed his full work duties for Respondent from the day he was hired in 1996 until December 31, 2018. Further, the Arbitrator finds that there is no evidence that Petitioner's unrelated lumbar spine condition has had any impact on his work-related cervical spine condition. Petitioner has never had upper back or cervical treatment before December 31, 2018 (TA at 26).

The Arbitrator concludes that the undisputed December 31, 2018 accident caused Petitioner to sustain a cervical herniated disc at C4-5, causing cervical radiculopathy, and aggravated Petitioner's pre-existing cervical degenerative disc disease. The Arbitrator further concludes that the July 2, 2019 work accident re-aggravated Petitioner's cervical herniated disc at C4-5, causing increased radicular symptoms, and pre-existing cervical degenerative disc disease. Therefore, while the Arbitrator finds there was a second work accident on July 2, 2019, Petitioner's cervical spine treatment, TTD, and the need for surgery, are all related to the December 31, 2018 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? (19WC026410 & 19WC026541)

The Arbitrator finds that the medical treatment provided to Petitioner is causally related to the December 31, 2018 accident. Additionally, the Arbitrator finds that all medical treatment provided to Petitioner to date was both reasonable and necessary. The Arbitrator finds that Respondent is required to pay the bills pursuant to section 8(a) and section 8.2 of the Workers' Compensation Act contained in Petitioner's Exhibit 26 for a total of $20,640.16 (PX 26) from the providers below:

- Elite Chiropractic & Sports Care, 7/24/19 – 8/15/19
- Mea-Munster, 1/3/19
- Midwest Interventional Spine Specialists, 3/1/19 – 1/6/2020
- Serenity Surgery Center, 3/20/19
- Superior Orthopedics, 6/23/2020
- Northpoint Orthopaedics, 9/26/19 – 6/4/2020

K. Is Petitioner entitled to any prospective medical care? (19WC026410 & 19WC026541)

Based on the above findings of accident, notice, and causal connection the Arbitrator finds that Respondent is required to authorize and pay for the treatment recommended by Dr. McComis, specifically the anterior cervical discectomy and fusion from C4 through C7 and post-operative care including physical therapy. Dr. McComis' opinion that surgery at all three levels is reasonable due to the risk of failure at adjacent levels if the C4-5 level is the only level operated upon is persuasive and reasonable.

L. What temporary (temporary total disability) benefits are in dispute? (19WC026410 & 19WC026541)

Based on the above findings of accident, notice, and causal connection, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits, from February 4, 2019 through May 17, 2019, and from July 24, 2019 through August 31, 2020. The Petitioner's award of temporary total disability benefits is related to the December 31, 2018 accident.

Section 8(b) of the Act provides that "in cases where the temporary total incapacity for work continues for a period of 14 days of more from the day of the accident compensation shall commence on the day after the accident." 820 ILCS 305/8(b). "The compensation rate for temporary total incapacity . . . shall be equal to 66 2/3% of the employee's average weekly wage . . .". 820 ILCS 305/8(b)(1).

The Arbitrator finds Petitioner was totally disabled from February 4, 2019 through May 17, 2019. On February 4, 2019 he was placed on a ten-pound work restriction, which triggered his entitlement to TTD. During this period Petitioner was directed to stay home from work by Respondent and he was not offered light duty work.

The Arbitrator, having found that Petitioner's cervical spine and right arm conditions are causally connected to the December 31, 2018 accident, awards additional TTD for the period from July 24, 2019 through August 31, 2020, the date of the arbitration hearing.

Following Petitioner's second date of accident, which was July 2, 2019, chiropractor Rosenthal placed Petitioner off work on July 24, 2019. (TA at 34, PX 12). The only time Petitioner returned to work for Respondent following July 2, 2019, was for a period of time between November 4, 2019 and November 10, 2019 (PX 19). During that brief period of time,

Petitioner worked four hours a day for four days before Mr. Murray told Petitioner that there was no more work for him. (TA at 40). Respondent paid Petitioner his full salary and benefits from July 3, 2019 until Respondent's workers' compensation carrier began paying temporary total disability benefits starting on September 12, 2019.

M. Should penalties or fees be imposed upon Respondent? (19WC026410 & 19WC026541)

Section 19(k) of the Act provides that "in case where there has been any unreasonable or vexatious delay of payment . . . 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." 820 ILCS 305/19(k).

Section 19(l) of the Act provides that "[i]f an employee has made a written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. . . . In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits . . . have been so withheld or refused, not to exceed $10,000." 820 ILCS 305/19(l).

Section 16 of the Act provides that "[w]henever the Commission shall find that the employer, his or her agent, service company or insurance carrier . . . has been guilty of unreasonable or vexatious delay . . . or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of [Section 19(k)], the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier." 820 ILCS 305/16.

Based on the facts and evidence as stated herein, the Arbitrator declines to award penalties pursuant to section 19(k) and 19(l), and attorney's fees pursuant to section 16 of the Workers' Compensation Act. The Arbitrator finds that Respondent's dispute as to the compensability of the claims and reliance on Dr. Singh's section 12 report and opinions was not unreasonable, vexatious, frivolous or done in bad faith.

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

CLAYTON ROGERS,

Petitioner,

vs. NO: 19 WC 26541

EHC INDUSTRIES,

21IWCC0024

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b-1) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, temporary total disability, medical 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 Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

At oral argument, Respondent moved to strike the Penalties argument in Petitioner's brief, contending the argument was not properly before the Commission because Petitioner did not file a Petition for Review, and the Motion was denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2020, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of

expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's oral motion to strike the penalties argument in Petitioner's brief is denied.

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

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(2)*. As there are no monies due and owing, there is no bond set by the Commission for the removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 15 2021
KAD/bsd
O120820
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19 (b-1) ARBITRATOR DECISION

ROGERS, CLAYTON
Employee/Petitioner

Case# **19WC026541**
19WC026410

EHC INDUSTRIES
Employer/Respondent

21IWCC0024

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

Unless a party does the following, this decision shall be entered as the decision of the Commission:

1) Files a Petition for Review within 30 days after receipt of this decision; and

2) Certifies that he or she has paid the court reporter $ 650.00 for the final cost of the arbitration transcript and attaches a copy of the check to the Petition; and
3) Perfects a review in accordance with the Act and Rules.

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:

0274 HORWITZ HORWITZ & ASSOC
STEVE COSTELLO
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b-1)

Clayton Rogers,
Employee/Petitioner
v.
EHC Industries
Employer/Respondent

Case # **19** WC **026541**
Consolidated cases: **19 WC 026410**

21IWCC0024

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **July 29, 2020**. Respondent filed a *Response* on **August 12, 2020**. The Honorable **Deborah J. Baker**, Arbitrator of the Commission, held a pretrial conference on **August 18, 2020**, and a trial on **August 31, 2020**, in the city of **Chicago**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **July 2, 2019**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$81,012.82**; the average weekly wage was **$2,098.78**.

On the date of accident, Petitioner was **62** 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 **$41,173.41** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$41,173.41**.

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

ORDER

Petitioner sustained an accident that arose out of and in the course of his employment on July 2, 2019.

Petitioner provided Respondent with timely notice of the July 2, 2019 work accident.

Petitioner's current condition of ill-being is related to the undisputed December 31, 2018 accident (19WC026410).

The arbitrator finds all periods of TTD to be related to the December 31, 2018 accident.

Petitioner's need for prospective medical treatment is related to the undisputed December 31, 2018 accident.

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

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter **$650.00** or the ***final*** cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

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

Signature of Arbitrator

September 23, 2020
Date

SEP 24 2020

21IWCC0024

FINDINGS OF FACT

TESTIMONY OF PETITIONER, CLAYTON ROGERS

Petitioner, Clayton Rogers, testified that he lives in Hammond, Indiana and currently works for Respondent, EHC Industries (Transcript of Evidence at Arbitration, hereinafter "TA" at 15). Respondent performs environmental work, involving such items as asbestos, lead, and mold (TA at 15). Petitioner started working for Respondent in June of 1996 (TA at 15). Petitioner works for Respondent as an Asbestos Supervisor. (TA at 16). Petitioner is a member of Local Laborers Union No. 225. (TA at 16).

As part of his job duties, Petitioner would carry out negative air machines, tools, job boxes, buffers, and chemicals (TA at 16). Petitioner testified that the negative air machines weigh somewhere between one-hundred fifty (150) and two hundred (200) pounds each (TA at 17). The negative air machines have to be carried up flights of stairs and usually two men carry up the machines (TA at 18). As part of his job, he also carries chemicals in 5-gallon buckets and pulls job boxes full of tools (TA at 17). Tools Petitioner uses are buffers, grinders, and hammers (TA at 17, 18).

Treatment to Back and Neck Prior To Undisputed December 31, 2018

Prior to December 31, 2018, Petitioner never had upper back or cervical back treatment (TA at 26). Prior to December 31, 2018, Petitioner had medical treatment to his lower back (TA at 26). Treatment to Petitioner's lower back continued after his December 31, 2018 date of injury (TA at 27). Petitioner is not claiming that any lower back injury or lower back treatment is related to his current workers' compensation claim (TA at 27).

When asked about a chiropractic treatment note dated July 24, 2019, Petitioner testified that approximately twenty-five years ago, in the early 1990's, he was a derby car racer. (TA at 32). Petitioner testified that he had not raced a derby car from December 31, 2018 to the present. (TA at 33). Petitioner stated that since the date he was hired by Respondent in 1996, he has never sought treatment to his neck due to racing. (TA at 33). Petitioner testified that prior to December 31, 2018, his neck had never interfered with his ability to do his job for Respondent. (TA at 33).

Undisputed December 31, 2018 Date of Injury

The parties have stipulated that Petitioner sustained a work-related accident on December 31, 2018. On that day, Petitioner was sent by Respondent to the location of UOP in Des Plaines, Illinois for asbestos removal (TA at 18). While tearing down the containment, Petitioner went to move the negative air machines away from the poly (TA at 19). The bottom negative air machine was still taped to the poly, and the top negative air machine rolled off (TA at 19). Petitioner pushed the negative air machine, and as he went back, there were cords

laying on the ground, and Petitioner tripped over the cords, landing on his neck and his right shoulder on a set of temporary steps (TA at 19). Petitioner then felt a sharp pain through his neck that went down to his right shoulder and right arm (TA 20).

Petitioner reported the incident to Kevin Murray ("Mr. Murray"), Respondent's Safety Coordinator (TA at 20). Petitioner contacted Mr. Murray on January 6, 2019, and sent an accident report to Mr. Murray on January 7, 2019 (TA at 20, 52-53).

Medical Treatment Following the December 31, 2018 Injury

Petitioner testified that he first sought treatment on January 3, 2019 at Community Hospital and saw Dr. Maura Dickinson where he complained of neck pain and pain radiating into the right shoulder, and right shoulder weakness. (TA at 21, PX 15). Petitioner underwent a CT scan of his cervical spine (TA at 21, PX 14-15).

Petitioner testified that around February 2019, he sought treatment with Dr. Shanu Kondamuri with Midwest Interventional Spine Specialists. (TA at 22; PX 2). Dr. Kondamuri gave Petitioner work restrictions of no lifting over 10 pounds from February 4, 2019 through May 17, 2019 (TA at 25). On May 17, 2019, Dr. Kondamuri released Petitioner back to full duty work (TA at 23). It was noted that as of the time of his release, Petitioner was 80 to 100 percent better (TA at 23). Petitioner noticed that after his full duty release, he still had some pain and aching in his right shoulder and right arm (TA at 23). Upon return to work, Petitioner experienced aches in his neck and right arm when he was lifting and moving things (TA at 23-24).

Work Status Following the December 31, 2018 Injury

Following the December 31, 2018 work injury, Mr. Murray instructed Petitioner not to come back to work (TA at 24). From December 31, 2018 through May 17, 2019, Petitioner did not work, and was paid his full wages by Respondent (TA at 24). The parties stipulated to the appropriate TTD credit for this period.

After he was released to full duty work on May 17, 2019, Petitioner returned to work for Respondent in the same job position and job duties that he had prior to December 31, 2018 (TA at 26).

July 2, 2019 Date of Injury

On July 2, 2019, Petitioner was working for Respondent at Northern Illinois University in DeKalb, Illinois (TA at 28). On that day, Petitioner was removing six (6) windows or six (6) doors made of aluminum and glass in addition to the glass around the doors, the aluminum framing, and asbestos caulk (TA at 28). Petitioner requested that one of his workers pick the doors up and set them on a wall (TA at 28). As the worker was having a hard time with this request, Petitioner went over to help him with the doors (TA at 28). The doors were approximately eight (8) feet high and 36 inches wide, weighing roughly 150 pounds each (TA at 28-29).

Petitioner picked up a door, carried it approximately ten (10) feet to place it against a wall, but then started feeling pain in his neck and down his shoulder and right arm (TA at 29).

The job assignment at Northern Illinois University was a three-day job, so Petitioner returned the next day to finish the job (TA at 29). On that day, Petitioner worked on tearing down and loading the truck, and felt severe pain (TA at 30). Petitioner's brother had to drive him home (TA at 30).

When asked about how his cervical or upper back complaints from December 31, 2018 differed from his cervical or upper back complaints from July 2, 2019, Petitioner testified that the pain was much more severe, "like a burning. There was a tingling in [his right] arm." (TA at 30). The pain was located in the same location as before July 2, 2019. (TA at 30).

Petitioner contacted Mr. Murray on approximately July 5 or 6, 2019 to report the injury that occurred on July 2, 2019. (TA at 31). Petitioner testified that he "let him [Kevin Murray] know what happened again." (TA at 31).

Work Status and Benefits Paid Following July 2, 2019

Petitioner testified that around September 12, 2019, Respondent stopped paying Petitioner his full salary and began paying him temporary total disability benefits of $1,199.00 per week. (TA at 35).

Between July 2, 2019 and September 12, 2019, Mr. Murray told Petitioner that he did not have to come back to work and Respondent continued paying Petitioner his salary and full benefits (TA at 35-37). During this time, Respondent continued to submit Petitioner's union credits for health insurance and retirement benefits (TA at 37).

During the time when Petitioner was released to work with light duty restrictions, he would have returned to work per the light duty restrictions had he been offered light duty work by Respondent (TA at 37).

No one from Respondent ever told Petitioner that his July 2, 2019 accident was disputed or denied (TA at 37).

Medical Treatment

Petitioner sought treatment from chiropractor Randy Rosenthal of Elite Chiropractic on July 24, 2019 (TA at 32, 34). Petitioner sought treatment with the chiropractor after the suggestion was made by Mr. Murray that Petitioner should visit a chiropractor (TA at 34). Petitioner had never visited with a chiropractor in the past (TA at 34). Petitioner underwent chiropractic care for his right shoulder and right arm from July 24, 2019 through August 15, 2019 (TA at 34).

Petitioner began treating with Dr. Gregory McComis on September 26, 2019 (TA at 38). Dr. Kondamuri gave Petitioner an Epidural Steroid Injection (ESI) and released Petitioner back to work with restrictions (TA at 39). Petitioner testified that during physical examinations by Dr. Kondamuri, Dr. Kondamuri would push down on Petitioner's head, which would cause Petitioner to feel pain down through his neck and right shoulder (TA at 44).

On October 31, 2019, Petitioner returned to visit Dr. McComis, who revised Petitioner's restrictions. (TA at 39-40). Dr. McComis recommended that Petitioner undergo surgery, specifically a cervical discectomy and fusion from C4-C7. (TA at 40). Petitioner currently has work restrictions of no lifting, pushing, or pulling more than twenty pounds. (TA at 40).

Return to Work in November of 2019

Petitioner returned to work for Respondent in November of 2019, and he worked four hours per day for four days (TA at 40). Petitioner worked in the warehouse cleaning vacuums and negative air machines (TA at 40). Petitioner noticed after that period of time, he was sore, and his neck and right arm were achy (TA at 40-41). Petitioner was to return to work the following weekend, but he testified that he was "hurting bad" and called Mr. Murray (TA at 41). Mr. Murray told Petitioner that the boss at Respondent didn't want to pay Petitioner that kind of money for four hours when they didn't have work for him (TA at 41).

Section 12 Evaluation at Respondent's Request by Dr. Kern Singh

On February 10, 2010, at Respondent's request, Petitioner was examined by Dr. Kern Singh (TA at 42). Petitioner testified that Dr. Singh probably spent five or six minutes with Petitioner (TA at 42). Dr. Singh performed a physical examination where he "checked" Petitioner's arms (TA at 42-43). During the examination, Dr. Singh did not physically push down on Petitioner's head (TA at 42-43). Dr. Singh had an assistant with him during the examination, but that assistant did not perform any test upon Petitioner or push down on Petitioner's head (TA at 45).

Time Off Work Following the July 2, 2019 Date of Injury

Petitioner was either off work completely, or given a 20-pound pushing, pulling, and lifting restriction from July 24, 2019, through the present time (TA at 47).

Second Opinion with Dr. Joseph Spott and Future Treatment

Petitioner returned to see Dr. McComis on June 4, 2020, who continued to recommend surgery consisting of an anterior cervical discectomy and fusion from C4 through C7 (TA at 46). Dr. McComis referred Petitioner to see Dr. Joseph Spott for a second opinion (TA at 46).

On June 23, 2020, during Petitioner's appointment with Dr. Spott, pushed down on Petitioner's head, causing pain through his neck and right shoulder and right arm (TA at 44-45,

46-47). Following the examination, Dr. Spott recommended surgical intervention (TA at 47, PX 11).

Petitioner is scheduled for an office visit with Dr. McComis on September 8, 2020 (TA at 47). The surgery recommended by and to be performed by Dr. McComis, has been scheduled for September 23, 2020 (TA at 48). Petitioner desires to have this surgery, and testified that he wants the surgery, "[b]ecause I've tried everything I can do, and nothing – it's still there, the pain." (TA at 48). Petitioner testified that he has not undergone the surgery because the surgery has not been authorized By Respondent. (TA at 50). Petitioner described his pain as sharp, and sometimes burning down through the neck and to the right shoulder with tingling (TA at 48). There is also tingling in Petitioner's right hand (TA at 48-49). Petitioner has not seen improvement in his complaints since his July 2, 2019 date of injury (TA at 49). Petitioner cannot pick up anything heavy and he watches TV a lot (TA at 49). Petitioner can help his wife unload the dishwasher and is able to drive a car, but he is bothered after about one hour (TA at 49-50).

Petitioner is not retired, but before his work accident of December 31, 2018, he was thinking of retiring in April of 2020 (TA at 50-51). Petitioner testified that since he has missed quite a bit of work since December 31, 2018, he is thinking about continuing to work so that he can get more credits for his union pension before he retires (TA at 51).

Other than the injuries of December 31, 2018 and July 2, 2019, Petitioner has not suffered injuries to his neck after those specific injury dates (TA at 52). Petitioner has not been in any car accidents or sustained any other injuries after December 31, 2018 and July 2, 2019 (TA at 52).

CROSS-EXAMINATION OF PETITIONER

On cross-examination, Petitioner testified that it's normal for him to fill out an accident report if an employee sustains a work accident because he is the supervisor (TA at 53-54). An injured employee also fills out a form (TA at 54). It is regular practice to fill out a form for every injury occurring (TA at 54). Petitioner would usually give the completed report to Mr. Murray, Respondent's employee. (TA at 54). Petitioner did not fill out a form (accident report) for his July 2, 2019 date of injury (TA at 55). Instead, Petitioner called Mr. Murray to report his injury (TA at 55).

Petitioner went to the emergency room after his December 31, 2018 injury, but did not go to the emergency room after his July 2, 2019 date of injury (TA at 55).

From approximately 1976 until about 1992, Petitioner participated in demolition derbies, where you "race cars and smash into each other" at local county fairs. (TA at 56-57). When Petitioner first started, he raced about once per year, but eventually he began racing at local county fairs and his racing increased to approximately five to six races per year (TA at 57). Petitioner would get into collisions at these races (TA at 57).

When asked what a Spurling test is, Petitioner testified that "It's pushing on your head. I'm not a doctor. I don't really know." (TA at 57). Petitioner testified that when a doctor performs a Spurling test, he knows that he is supposed to feel pain in his neck and shoulder and arm because he felt pain when the test was performed on him. (TA at 58).
No one told Petitioner to look out for this test and Petitioner did not know that there are 6 different ways to perform a Spurling exam (TA at 59). Petitioner testified that Dr. Singh, during his examination, may have moved Petitioner's head sideways (TA at 60).

When Petitioner saw Dr. McComis on September 26, 2019, Petitioner told Dr. McComis that the chiropractic treatment form Chiropractor Rosenthal did not help (TA at 62). When asked about an initial chiropractic record, which states that Petitioner first had 6 out of 10 pain for 76 to 100 percent of the time, Petitioner testified that it sounded correct (TA at 62). When asked about a chiropractic record from his last visit in August 2019, which states that Petitioner had 2 out of 10 pain that was present 0 to 25 percent of the time, Petitioner testified that it was "kind of an improvement." (TA at 63).

Petitioner testified that he told Chiropractor Rosenthal that he lifted doors on July 2, 2019 and felt pain, and if the records state that he had pain in his neck after falling at work a couple days before the visit, the chiropractor's records are incorrect and Chiropractor Rosenthal "got that mixed up." (TA at 66). Petitioner testified that he did not sustain a fall at work on or about July 20, 2019 (TA at 68). The medical records from Chiropractor Rosenthal which reflect complaints of pain radiating only into his shoulder and not into his arm or elbow, would not be correct (TA at 68).

Petitioner agreed that when Petitioner visited Dr. Kondamuri on September 12, 2019, Petitioner reported severe pain in his neck, and Dr. Kondamuri prescribed injections (TA at 69-70). Petitioner testified that he could perform his full duties for his heavy-duty job from May 2019 through July 2019 (TA at 70). Petitioner acknowledged that he has a history of lower back problems and that he had been recommended for a spinal cord stimulator for his low back. (TA at 70).

When asked about a reference in Dr. McComis' records to Petitioner feeling better since being off work due to COVID, Petitioner testified that this was incorrect, and he was not working anytime in March 2020 (TA at 71).

Petitioner testified that he is putting his upcoming surgery through his group insurance carrier because Respondent denied his workers' compensation claim. Petitioner testified that he could not have had surgery in March 2020 due to "the virus." (TA at 75).

REDIRECT EXAMINATION OF PETITIONER

On redirect examination, Petitioner testified that no accident report was created by Petitioner following his July 2, 2019 accident as Respondent did not request Petitioner provide an accident report (TA at 76-77). Petitioner testified that he did not report to the emergency

room following his July 2, 2019 date of accident as Mr. Murray sent Petitioner some information about chiropractors and suggested he try a chiropractor. (TA at 77).

When asked about visiting Dr. Singh for a Section 12 examination, Petitioner stated that Dr. Singh "had me go back, side to side." (TA at 78). Petitioner testified that has not been working during COVID or any other time he was not supposed to be working (TA at 80-81).

MEDICAL RECORDS and TREATMENT

Medical Treatment Following the December 31, 2018 Date of Injury

Petitioner first sought treatment on January 3, 2019 at Community Hospital and saw Dr. Maura Dickinson where he complained of neck pain and pain radiating into the right shoulder, and right shoulder weakness. (TA at 21, PX 15). Petitioner underwent a CT scan of his cervical spine (TA at 21, PX 14-15).

On January 12, 2019, Petitioner underwent a cervical spine MRI. The radiologist findings indicated severe, right greater than left, foraminal narrowing at C4-C5 due to posterior osteophyte disc complexes/disc protrusion; left-sided posterior osteophyte disc complexes/disc protrusion at C5-C6 with significant narrowing of the left neural foramen; narrowing of C4-C7 disc spaces; and multilevel spondylosis. (PX 7, 15, 16).

On February 4, 2019, Petitioner treated with Dr. Kondamuri, to whom Petitioner had been referred by his primary care physician. Dr. Kondamuri gave Petitioner a 10-pound lifting restriction and prescribed physical therapy (TA at 21; PX2).

Petitioner sought treatment with his primary doctor, Dr. Kondamuri, on February 11, 2019 (PX 2). Dr. Kondamuri noted that Petitioner fell on December 31, 2018 at work landing backward on his right upper back, shoulder, and neck striking a set of moveable stairs (PX 2). Since that date, Petitioner has had right sided cervical pain, right posterior shoulder pain, and pain into the right triceps area, along with occasional tingling in the 3rd and 4th digits of the right hand (PX 2).

On May 17, 2019, Petitioner returned to Dr. Kondamuri who noted that Petitioner had three to four days of excellent pain relief following the March 1, 2019 ESI, 50-75% relief after the second ESI on March 20, 2019, and 80-100% pain relief following the third ESI on May 2, 2019. Dr. Kondamuri opined that Petitioner had reached MMI and could return to work full duty without restrictions. (TA at 23; PX 2).

Medical Treatment Following the July 2, 2019 Date of Injury

On July 16, 2019, Petitioner was evaluated by Nurse Practitioner Kathryn Trojan who, based on the records, appears to have worked in the same practice group at Midwest Interventional Spine Specialists as Dr. Kondamuri. The progress note indicates "Patient re-

injured at work 7/3/19 when lifting doors." The progress note indicates that Petitioner was taking prescription pain medication for an unrelated lower back condition. (PX 2)

On July 24, 2019, Petitioner treated with chiropractor Randy Rosenthal with Elite Chiropractic & Sports Care. Petitioner complained of right neck pain, neck tightness, and shoulder tightness. Petitioner reported that the pain radiated to the right shoulder and was rated 6 out of 10 on a 10-point scale. Chiropractor Rosenthal found spinal segment dysfunction at C4, C5, C6, T2 and T4. Chiropractor Rosenthal noted that "with his unfortunate events in his life (derby car racer) that the degenerative properties in his spine are the true cause of his condition." (PX 12).

On July 31, 2019, Petitioner returned to Chiropractor Rosenthal and noted that his pain was rated 3 out of 10 although he continued to complain of right neck pain, neck tightness, and shoulder tightness. On August 5, 2019, Petitioner followed up with Chiropractor Rosenthal and reported pain rated 2 out of 10 but noted that his right scapula was bothering him. On August 7, 2019, Petitioner returned to Chiropractor Rosenthal and noted that his pain was rated 1 out of 10 and he was continually feeling better in the neck and shoulder. On August 8, 2019, Petitioner followed up with Chiropractor Rosenthal and reported that his pain was rated 3 out of 10. Petitioner indicated that he was feeling worse. On August 12 and 15, 2019, Petitioner returned to Chiropractor Rosenthal and noted that his pain was rated 2 out of 10. (PX 12). Petitioner underwent chiropractic care for his right shoulder and right arm from July 24, 2019 through August 15, 2019 (TA at 34; PX 12).

On September 12, 2019, Petitioner followed-up with Dr. Kondamuri. Petitioner presented with "right sided neck pain due to a lifting injury while working on 7/2/19." Dr. Kondamuri noted that Petitioner had moderate to severe pain necessitating interventional pain management, diagnosed Petitioner with radiculopathy of the cervical region, and recommended that Petitioner undergo an ESI to C6-C7. Dr. Kondamuri placed Petitioner off work and referred Petitioner to Dr. McComis with a diagnosis of cervical radiculopathy. (TA at 35; PX 2; PX 4). Petitioner underwent ESI injections to C6-C7 on September 27, 2019 and October 30, 2019. (PX 2)

Petitioner first visited Dr. Gregory McComis on September 26, 2019 (TA at 38; PX 7). Petitioner reported sustaining a work injury to his neck and right shoulder on December 31, 2018 for which he underwent injections that helped. The progress note states: "States 7/2/19 he was at work and picked up a set of doors and had severe pain in his neck and down his right shoulder and upper arm. States right arm has tingling on and off." Petitioner reported that he initially injured his neck and right shoulder on December 31, 2018 and that he had been treating with a chiropractor which did not help. Dr. McComis noted that Petitioner was already taking prescription pain killers for an unrelated lower back condition. Dr. McComis reviewed a cervical spine MRI that revealed a herniated disc on the right side at C4-5, Bone-on-bone at C5-C6 with left foraminal stenosis, and bone-on-bone at C6-C7 with bilateral foraminal stenosis. Dr. McComis diagnosed Petitioner with a herniated cervical disc, cervical radiculopathy, and

cervical spondylosis. Dr. McComis opined that "his problem is the herniated disc at C4-C5 and I would recommend that he undergo ACDF at C4-C5." (PX 7; TA at 39)

On September 27, 2019, Dr. Kondamuri gave Petitioner an epidural steroid injection at C6-7 to treat cervical radiculopathy, cervical spinal stenosis and a cervical herniated disc. (TA at 39, PX 2).

On October 10, 2019, Petitioner followed up with Dr. Kondamuri, who released Petitioner back to work with restrictions of no lifting, pushing, or pulling over 20 pounds (TA at 39). Petitioner still had symptoms in his neck and right arm (TA at 39; PX 5).

On October 31, 2019, Petitioner returned to visit Dr. McComis and reported that the second ESI had not helped and he experienced numbness and tingling down his hand. Dr. McComis released Petitioner to work with a 20-pound weight restriction and recommended that Petitioner undergo a cervical discectomy and fusion from C4-C7. (PX 7; TA at 40).

On November 14, 2019, Dr. Kondamuri noted that Petitioner had improved approximately 50% from the second ESI but Petitioner still had residual pain. Dr. Kondamuri recommended that Petitioner pause injections for three months, restart physical therapy, and return to Dr. McComis. Dr. Kondamuri continued Petitioner's work restrictions of no lifting, pushing, or pulling over twenty pounds. (PX 2; PX 6).

On December 5, 2019, Dr. McComis reevaluated Petitioner and opined that conservative treatment had failed. Dr. McComis recommended that Petitioner undergo an anterior cervical discectomy and fusion from C4-C7 and subsequent physical therapy. (PX 7) Dr. McComis placed Petitioner off work. (TA at 41-42; PX 9).

On March 24, 2020, Petitioner visited Dr. McComis, who placed Petitioner off work (TA at 45-46; PX 7; PX 9).

Petitioner returned to see Dr. McComis on June 4, 2020, who continued to recommend surgery consisting of an anterior cervical discectomy and fusion from C4 through C7 (TA at 46). Dr. McComis referred Petitioner to see Dr. Joseph Spott for a second opinion and kept Petitioner off work (TA at 46; PX 8, PX 9, PX 10).

On June 23, 2020, Petitioner saw Dr. Spott with Superior Orthopedics. The progress note indicates that Petitioner reported falling back into steps and hitting his right-side neck and right shoulder at work on December 31, 2018. Petitioner also indicated that he reinjured his cervical spine on "6/2/2019" when he was carrying a door and hit his neck while it was falling back. Dr. Spott noted that chiropractic care and two injections did not help. Subsequently, Dr. Spott noted that Petitioner reported that the injections helped the first time around. Dr. Spott diagnosed Petitioner with cervical disc disorder at C4-C5 with radiculopathy and recommended that Petitioner undergo surgery to C4-C5. (TA at 47, PX 11; PX 12).

DEPOSITION TESTIMONY

DEPOSITION OF DOCTOR GREGORY MCCOMIS

DIRECT EXAMINATION OF DR. MCCOMIS

On direct examination, Dr. Gregory McComis testified by way of an evidence deposition on May 8, 2020. (PX 18 at 4). Dr. McComis is a board-certified orthopedic surgeon with a focus on spine surgery (PX 18 at 6). Dr. McComis has been retained by both plaintiff and defense firms for independent medical exams (PX 18 at 9).

Dr. McComis first saw Petitioner on September 26, 2019 by referral from Dr. Kondamuri (PX 18 at 13). During that visit, Dr. McComis determined that Petitioner had limited rotation to the right and a positive Spurling's sign and weakness in his right biceps which is C5 (PX 18 at 14). Furthermore, Dr. McComis testified x-rays showed "some mild degenerative changes at C3-4 and C4-5. Then he had moderate degenerative changes at C5-6. And then he was bone on bone at C6-7, so that disk had completely worn out." (PX 18 at 14).

Dr. McComis reviewed the MRI of January 12, 2019 which "showed a disk herniation on the right side at C4-5, and then he was bone on bone at C5-6 with left foraminal stenosis and bone on bone C6-7 with bilateral foraminal stenosis." (PX 18 at 15). Dr. McComis diagnosed Petitioner with "cervical radiculopathy and a herniated cervical disk and then cervical spondylosis" and recommended surgery at C4-5 as Petitioner had exhausted "all nonoperative treatment" (PX 18 at 15). Dr. McComis opined that the only way for the Petitioner to get pain relief is to have surgery as the symptoms and clinical findings "correlate perfectly with the disk herniation at C4-5." (PX 18 at 16).

Dr. McComis further testified that he asked Dr. Jayesh Thakrar, a fellowship-trained musculoskeletal radiologist that Dr. McComis is familiar with and trusts as a radiologist, to read Petitioner's MRI results (PX 18 at 17). Dr. McComis testified that he and Dr. Thakrar arrived at the same diagnosis, that Petitioner had a herniated disk (PX 18 at 18). Dr. McComis explained that a disk protrusion is a different descriptive term for a disk herniation and that some doctors use these terms interchangeably. (PX 18 at 19).

Dr. McComis recommended a discectomy and surgical fusion from C4-7 after his October 31, 2019 office visit, because "if you do a cervical discectomy and fusion at one level, you put the adjacent level at risk for developing problems (PX 18 at 20-22).

When asked whether he had an opinion to a reasonable degree of medical and surgical certainty as to whether the three-level fusion that he recommended for Petitioner was reasonable and necessary, Dr. McComis testified that the surgery was reasonable and necessary. (PX 18 at 22).

Further, Dr. McComis opined that the first accident of December 31, 2018, which is described in the accident report and the Petitioner's account of the accident, would be the type of injury to cause a disk herniation (PX 18 at 24). Petitioner had pre-existing degenerative changes at C5-6 and C6-7 which Dr. McComis attributed some of his symptoms to; however, he testified that he was "very confident that the C4-5 disk herniation is an acute problem leading to his radicular symptoms in his arm and neck." (PX 18 at 25).

Regarding causation and the second accident of July 2, 2019, Dr. McComis testified that Petitioner was doing heavy labor again which caused a re-aggravation of the December 31, 2018 injury to the same disk "and that's what puts him at the point where he is now." (PX 18 at 24). The need for treatment in the other two cervical spine levels (C5-6 and C6-7) would also be related to the work injury. Dr. McComis opined that it was more likely than not that Petitioner injured the other cervical spine levels at the time of the injury, however, it was his opinion that he needed to include the other levels in the surgical fusion because it is common for patients who undergo a one-level fusion to develop "adjacent level disease" in the non-fused levels due to the one-level fusion, which would require a second surgical procedure. (PX at 25-26).

When asked whether the multi-level fusion surgery of the neck he is recommending is related to one or both of the accidents, Dr. McComis testified that he would relate the need for surgery to both of the accidents (PX 18 at 25).

Dr. McComis testified that "any sharp blow or... just a stress on his ... neck could have caused this herniation on the right side." (PX at 27). Dr. McComis testified Petitioner's treatment has been medically necessary and reasonable. (PX at 30).

Dr. McComis next testified as to the Section 12 examination report of Dr. Singh, who was retained as an expert for Respondent. Dr. McComis testified about inconsistencies between his exam findings and Dr. Singh's exam findings. (PX 18 at 31). Dr. McComis did not agree that Petitioner did not have loss of sensation as he found Petitioner had a little bit of decreased sensation in the right hand on March 24, 2020. Decreased sensation is part of radiculopathy. (PX 18 at 31-32). He also disagreed with Dr. Singh regarding Petitioner's range of motion, as Dr. Singh indicated Petitioner had full range of motion (PX 18 at 33). Dr. McComis found that Petitioner had decreased range of motion at both the December 5, 2019 visit and the March 24, 2020 visit. Dr. McComis testified that Petitioner never had full range of motion of the neck during any exam. (PX 18 at 32). Dr. McComis testified that a Spurling test is done when looking for signs of radiculopathy and Petitioner had had positive Spurling's signs consistently. (PX 18 at 34). Dr. McComis testified that "you have to push down on the patient's head in order to get a test for a Spurling's sign." (PX 18 at 35).

Dr. McComis testified that Dr. Singh's findings of a normal physical exam were inconsistent with his examination findings. (PX 18 at 33-35). Further, Dr. McComis testified that he disagreed with Dr. Singh's diagnosis of a cervical strain, as a cervical strain will typically resolve in a matter of weeks or maybe in a month or two (PX 18 at 36-37).

Dr. McComis testified it would be a mistake for Petitioner to return to work prior to surgery based on his re-injury on July 2, 2019. (PX 18 at 37-38). Dr. McComis testified Petitioner is not at MMI. (PX 18 at 41).

CROSS-EXAMINATION OF DR. MCCOMIS

On cross-examination, Dr. McComis testified that he is licensed to practice in Indiana but not Illinois (PX 18 at 44-45). Dr. McComis testified he did not review medical records from Dr. Oetter (PX 18 at 46). He agreed that the first time he saw Petitioner was September 26, 2019, about nine to ten months after the first accident and about ten weeks after the second accident (PX 18 at 47-48). Dr. McComis testified that Petitioner's symptoms could be related to his pre-existing condition but his pre-existing condition probably could have been aggravated by his fall also. (PX 18 at 52). Dr. McComis agreed that no MRI is available after the July 2019 accident and therefore it is not known whether or not the Petitioner's "physical structures have changed." (PX 18 at 54). Dr. McComis testified that he did not know whether Petitioner had been working in any capacity in March 2020. (PX 18 at 56).

Dr. McComis testified that his exam findings are objective and referenced a note where Petitioner did not have weakness of his biceps, whereby the nerve root could have been less irritated at that time and that's why "the motor exam changed." (PX 18 at 60-61). He testified "the Spurling's sign is consistent throughout my entire exam." (PX 18 at 61). Dr. McComis testified that normal extension, flexion, and rotation is relative to age; necks tend to be stiffer as people age (PX 18 at 63). Dr. McComis testified that since Petitioner has arthritic changes in the neck, he's got a relatively stiff neck and can only extend five degrees, with typical extension being at least 15 to 20 degrees (PX 18 at 63-64). Dr. McComis agreed that he could determine Petitioner was a surgical candidate after one exam, and that, hypothetically, "exam findings can change over time (PX 18 at 65).

RE-DIRECT EXAMINATION OF DR. MCCOMIS

On redirect examination, Dr. McComis testified that chiropractic treatment was reasonable treatment after the July accident (PX 18 at 67). He also agreed that some of the loss of motion in Petitioner's neck is related to his disk herniation (PX 18 at 68).

DEPOSITON OF DR. KERN SINGH

DIRECT EXAMINATION OF DR. SINGH

Dr. Kern Singh testified by way of an evidence deposition on June 3, 2020 (RX 1 at November 16, 2016. (RX 1 at 2). On direct examination, Dr. Singh testified that he is Board Certified by the American Board of Orthopaedic Surgery and his practice consists of treating patients with spinal disorders (RX 1 at 5). Dr. Singh took a history from Petitioner of two separate injuries; one on December 31, 2018 and the second on July 2, 2019 (RX 1 at 8). Dr.

Singh testified that Petitioner's history of low back problems, long-term opioid use and chronic pain was significant in developing his findings. (RX 1 at 9).

Dr. Singh testified that when he saw Petitioner in February of 2020, Petitioner stated that he had neck pain, anywhere from a 5 to 9 out of 10, and he had entire right arm pain into the elbow (RX 1 at 12).

Dr. Singh testified that he performed a physical examination of Petitioner at the time of his examination (RX 1 at 14). Dr. Singh explained under direct examination, that a Spurling sign is a test for possible cervical radiculopathy, involving downward pressure on top of the head and then rotation of the patient to the side of the pain, and it closes down the nerve root foramen, causing irritation to the nerve root, potential, into the arm (RX at 14).

Dr. Singh reviewed the images from the January 12, 2019 cervical spine MRI that he interpreted as revealing diffuse degenerative changes in particular at C5-6 and C6-7 with a loss of disc signal intensity, and collapse of the disc space at C5-6 and C6-7 with mild neural foraminal stenosis (RX 1 at 15). Mild neural foraminal stenosis means there is some narrowing of where the nerve root exits at the C5-6 and C6-7 levels (RX 1 at 15-16).

To a reasonable degree of medical and surgical certainty, Dr. Singh diagnosed Petitioner with cervical musculature strain and C5-6 and C6-7 degenerative disease, and felt that Petitioner sustained a soft tissue strain of his cervical spine which had resolved (RX 1 at 16). Dr. Singh testified there was radiographic evidence of disc degeneration at C5-6 and C6-7 but Dr. Singh felt Petitioner was asymptomatic as he could not correlate any examination findings with it. (RX 1 at 16). Dr. Singh opined that the MRI findings showed "age-appropriate degenerative changes." (RX 1 at 17). Dr. Singh testified that four weeks of physical therapy three times per week was appropriate and reasonable (RX 1 at 17). Dr. Singh believed Petitioner could return to his full duty job as related for both his December 31, 2018 work injury and his July 2, 2019 incident (RX at 18).

When asked on direct examination about his addendum report from May 30, 2020, Dr. Singh had written the Addendum after taking a second look at the MRI, and Dr. Singh did not appreciate any disc herniation at C4-5 (RX 1 at 18-20). Dr. Singh believed the disc herniation at C4-5 is part of what he believes to be a diffuse degenerative process s with no overt disc herniation present (RX 1 at 20).

CROSS-EXAMINATION OF DR. SINGH

On cross-examination, Dr. Singh testified that he performs four to six examinations of litigated matters each week, and is hired by Respondents 65 to 70 percent of the time (RX 1 at 22-23).

Dr. Singh agreed that Petitioner had a positive response to three epidural injections that allowed Petitioner to go back to full duty work (RX 1 at 26). Dr. Singh agreed that the physical

therapy and cervical epidural steroids provided were successful in treating the symptoms of a cervical radiculopathy from January to May 17, 2019 and was reasonable, necessary, and related to the accident of December 31, 2018 (RX 1 at 26-27).

Dr. Singh had never been supplied the accident report where Petitioner fell down the stairs, struck his head, injured his neck on December 31, 2018, and that falling down and injuring your neck can herniate a disc in the neck (RX 1 at 27-28). In addition, the fall could also aggravate or make painful a degenerative disc disease in Petitioner's neck, at C4-5, C5-6, and C6-7 (RX 1 at 46).

Dr. Singh testified that he was not provided with the January 3, 2019 records from Community Healthcare System. (RX 1 at 28).

When asked about Petitioner's July 2, 2019 date of injury, Dr. Singh admitted that lifting a heavy door is a way to injure the neck and is a possible mechanism of injury (RX 1 at 30). In addition, Petitioner's July 2, 2019 lifting episode theoretically could have aggravated a degenerative disc disease at C4-5, C5-6, and C6-7 (RX 1 at 46).

Dr. Singh admitted that his summary omitted the Dr. McComis finding of a positive Spurling and biceps weakness 4/5, and motor weakness on exam on external rotation of the right shoulder, and that those findings could be consistent with a cervical radiculopathy (RX 1 at 32).

Dr. Singh opined that if Petitioner has C5 weakness, biceps weakness, he has a biceps reflex loss, then a C5 ACDF – C4-5 ACDF would be appropriate and reasonable (RX 1 at 34-35).

Dr. Singh testified further that he did not find any signs of symptom magnification on his examination (RX 1 at 42).

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? (19WC026541)

D. What was the date of the accident? (19WC026541)

The Arbitrator finds that Petitioner sustained a work-related accident that arose out of and in the course of Petitioner's employment with Respondent on July 2, 2019.

In order to recover benefits under the Illinois Workers' Compensation Act, a claimant bears the burden of proving that his injury arose out of an in the course of his employment *McAllister v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 162747WC, 2019 Ill. App. LEXIS 339. The occurrence of an accident at the claimant's workplace does not automatically establish that the injury "arose out of" the claimant's employment. *Id.* at P24.

Petitioner has been working for Respondent since 1996 and is currently working as an Asbestos Supervisor. The parties have stipulated that Petitioner sustained a work-related accident on December 31, 2018 (case no. 19WC026410).

Respondent placed the second accident of July 2, 2019 in dispute at arbitration (case no. 19WC026541). Petitioner testified that on July 2, 2019, he was assigned to work at Northern Illinois University for Respondent when he felt pain in his neck that traveled down to his right shoulder and right arm as he helped a coworker to lift some doors that were eight feet tall, thirty-six inches wide, and weighed approximately 150 pounds each. Petitioner returned to the same job site the next day (July 3, 2019) to complete the three-day job assignment where he worked on tearing down and loading the truck. The same day (July 3, 2019), Petitioner began to experience severe pain, to the point where his brother had to drive him home.

When asked about how his cervical or upper back complaints from December 31, 2018 differed from his cervical or upper back complaints from July 2, 2019, Petitioner testified that the pain was much more severe, "like a burning. There was a tingling in [his right] arm." Petitioner testified that the pain was located in the same location as before July 2, 2019. (TA at 30).

Petitioner testified that Mr. Murray, Respondent's Safety Coordinator, instructed him to stay home and sent Petitioner information about chiropractic treatment as Petitioner had never treated with a chiropractor before. Petitioner also testified that Mr. Murray did not ask Petitioner to complete an accident report. The medical records show that on July 16, 2019, Petitioner presented to Midwest Interventional Spine Specialists where he was already treating for his unrelated lower back condition, and on that day, Nurse Trojan documented that Petitioner reinjured his neck at work on "7/3/19" when lifting doors. (PX 2)

The Arbitrator finds that the description of the accident just a few weeks after it occurred is consistent with Petitioner's testimony despite the date of accident typographical error which incorrectly indicates that the accident occurred on July 3, 2019 instead of July 2, 2019. The Arbitrator finds further that the short period of time between the date of accident and Petitioner's first visit at Midwest Interventional Spine Specialists after July 2, 2019 does not undermine Petitioner's credibility. Additionally, the Arbitrator finds it significant that Petitioner had already been prescribed pain medication for his unrelated lower back condition at the time of the July 2, 2019 accident.

The Arbitrator finds that Petitioner testified credibly as to the events that occurred on July 2, 2019 and Respondent called no witnesses to dispute Petitioner's testimony. Additionally, the Arbitrator finds that Petitioner's testimony is supported by the medical records. Accordingly, the Arbitrator finds that Petitioner sustained an accident which arose out of and in the course of his employment on July 2, 2019.

E. Was timely notice of the accident given to Respondent? (19WC026541)

The Arbitrator finds that timely notice of the accident was given to Respondent on approximately July 5 or 6, 2019. The unrebutted testimony of Petitioner is that he called Respondent's safety coordinator, Kevin Murray, on approximately July 5 or 6, 2019 to report the neck injury that occurred on July 2, 2019 (TA at 31). No accident report was created by Petitioner following his July 2, 2019 accident, as Respondent did not request Petitioner to provide an accident report. Further, the Arbitrator notes that Petitioner testified that nobody from Respondent ever told him that his July 2, 2019 accident was disputed or denied. (TA at 37). Therefore, the Arbitrator finds that Petitioner gave Respondent timely notice of his July 2, 2019 accident.

F. Is Petitioner's current condition of ill-being causally related to the injury? (19WC026410 & 19WC026541)

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the undisputed accident of December 31, 2018. The Arbitrator finds Petitioner's testimony credible and consistent with the medical records. Further, the Arbitrator finds the opinions of Dr. McComis to be more credible and persuasive than the opinions of Dr. Singh.

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

Furthermore, it has long been held that "a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *Int'l Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64 (1982). "When the claimant's version of the accident is uncontradicted and his testimony is unimpeached, his recital of the facts surrounding the accident may be sufficient to sustain an award. *Id.* at 64.

On February 11, 2019, Dr. Kondamuri noted that Petitioner fell on December 31, 2018 at work landing backward on his right upper back, shoulder, and neck striking a set of moveable stairs (PX 2). Since that date, Petitioner has had right sided cervical pain, right posterior

shoulder pain, and pain into the right triceps area, along with occasional tingling in the 3rd and 4th digits of the right hand (PX 2).

Following the July 2, 2019 accident Petitioner was directed by Respondent to stay home while they paid him full salary. At the direction of Respondent, Petitioner tried chiropractic care in July of 2019 and August of 2019 which did not provide lasting relief. Petitioner then returned to Dr. Kondamuri who referred Petitioner to Dr. McComis. Dr. McComis opined in his deposition that he would relate the need for surgery to both of the accidents (PX 18 at 25). Additionally, the medical records reflect Petitioner has consistently complained of similar neck and right arm pain following both injuries at work. Petitioner testified that while he had returned to work in a full duty capacity for Respondent following his May 17, 2019 release by Dr. Kondamuri, he was only 80 to 100 percent better (TA at 23). Following his full duty release, Petitioner still had pain and aching in his right shoulder and right arm, and that upon returning to work, Petitioner experienced aches in his neck and right arm when he was lifting and moving things (TA at 23-24).

The Arbitrator gives the chiropractic note dated July 24, 2019, no weight as the note does not state when Petitioner raced derby cars and the chiropractor never reviewed the MRI or any other diagnostic testing. Further, Petitioner credibly testified that he has not raced derby cars since the early 1990's and he has performed his full work duties for Respondent from the day he was hired in 1996 until December 31, 2018. Further, the Arbitrator finds that there is no evidence that Petitioner's unrelated lumbar spine condition has had any impact on his work-related cervical spine condition. Petitioner has never had upper back or cervical treatment before December 31, 2018 (TA at 26).

The Arbitrator concludes that the undisputed December 31, 2018 accident caused Petitioner to sustain a cervical herniated disc at C4-5, causing cervical radiculopathy, and aggravated Petitioner's pre-existing cervical degenerative disc disease. The Arbitrator further concludes that the July 2, 2019 work accident re-aggravated Petitioner's cervical herniated disc at C4-5, causing increased radicular symptoms, and pre-existing cervical degenerative disc disease. Therefore, while the Arbitrator finds there was a second work accident on July 2, 2019, Petitioner's cervical spine treatment, TTD, and the need for surgery, are all related to the December 31, 2018 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? (19WC026410 & 19WC026541)

The Arbitrator finds that the medical treatment provided to Petitioner is causally related to the December 31, 2018 accident. Additionally, the Arbitrator finds that all medical treatment provided to Petitioner to date was both reasonable and necessary. The Arbitrator finds that Respondent is required to pay the bills pursuant to section 8(a) and section 8.2 of the Workers' Compensation Act contained in Petitioner's Exhibit 26 for a total of $20,640.16 (PX 26) from the providers below:

- Elite Chiropractic & Sports Care, 7/24/19 – 8/15/19
- Mea-Munster, 1/3/19
- Midwest Interventional Spine Specialists, 3/1/19 – 1/6/2020
- Serenity Surgery Center, 3/20/19
- Superior Orthopedics, 6/23/2020
- Northpoint Orthopaedics, 9/26/19 – 6/4/2020

K. Is Petitioner entitled to any prospective medical care? (19WC026410 & 19WC026541)

Based on the above findings of accident, notice, and causal connection the Arbitrator finds that Respondent is required to authorize and pay for the treatment recommended by Dr. McComis, specifically the anterior cervical discectomy and fusion from C4 through C7 and post-operative care including physical therapy. Dr. McComis' opinion that surgery at all three levels is reasonable due to the risk of failure at adjacent levels if the C4-5 level is the only level operated upon is persuasive and reasonable.

L. What temporary (temporary total disability) benefits are in dispute? (19WC026410 & 19WC026541)

Based on the above findings of accident, notice, and causal connection, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits, from February 4, 2019 through May 17, 2019, and from July 24, 2019 through August 31, 2020. The Petitioner's award of temporary total disability benefits is related to the December 31, 2018 accident.

Section 8(b) of the Act provides that "in cases where the temporary total incapacity for work continues for a period of 14 days of more from the day of the accident compensation shall commence on the day after the accident." 820 ILCS 305/8(b). "The compensation rate for temporary total incapacity . . . shall be equal to 66 2/3% of the employee's average weekly wage . . .". 820 ILCS 305/8(b)(1).

The Arbitrator finds Petitioner was totally disabled from February 4, 2019 through May 17, 2019. On February 4, 2019 he was placed on a ten-pound work restriction, which triggered his entitlement to TTD. During this period Petitioner was directed to stay home from work by Respondent and he was not offered light duty work.

The Arbitrator, having found that Petitioner's cervical spine and right arm conditions are causally connected to the December 31, 2018 accident, awards additional TTD for the period from July 24, 2019 through August 31, 2020, the date of the arbitration hearing.

Following Petitioner's second date of accident, which was July 2, 2019, chiropractor Rosenthal placed Petitioner off work on July 24, 2019. (TA at 34, PX 12). The only time Petitioner returned to work for Respondent following July 2, 2019, was for a period of time between November 4, 2019 and November 10, 2019 (PX 19). During that brief period of time,

Petitioner worked four hours a day for four days before Mr. Murray told Petitioner that there was no more work for him. (TA at 40). Respondent paid Petitioner his full salary and benefits from July 3, 2019 until Respondent's workers' compensation carrier began paying temporary total disability benefits starting on September 12, 2019.

M. Should penalties or fees be imposed upon Respondent? (19WC026410 & 19WC026541)

Section 19(k) of the Act provides that "in case where there has been any unreasonable or vexatious delay of payment . . . 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." 820 ILCS 305/19(k).

Section 19(l) of the Act provides that "[i]f an employee has made a written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. . . . In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits . . . have been so withheld or refused, not to exceed $10,000." 820 ILCS 305/19(l).

Section 16 of the Act provides that "[w]henever the Commission shall find that the employer, his or her agent, service company or insurance carrier . . . has been guilty of unreasonable or vexatious delay . . . or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of [Section 19(k)], the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier." 820 ILCS 305/16.

Based on the facts and evidence as stated herein, the Arbitrator declines to award penalties pursuant to section 19(k) and 19(l), and attorney's fees pursuant to section 16 of the Workers' Compensation Act. The Arbitrator finds that Respondent's dispute as to the compensability of the claims and reliance on Dr. Singh's section 12 report and opinions was not unreasonable, vexatious, frivolous or done in bad faith.

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 causation -cerv. & lumbar	☐ Second Injury Fund (§8(e)18)
X Vacate medical bills cerv. & lumbar	☐ PTD/Fatal denied
☒ Modify down-MAW, left arm PPD	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PAULA APELES,

Petitioner,

vs. NO: 13 WC 20679

GRAPHICS PACKAGING,

Respondent.

21IWCC0025

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Petitioner was employed as a machine operator which involved operating and setting up machines. On November 16, 2012, Petitioner tripped on a scrap box next to the machine, lost her footing and fell. Petitioner testified she landed on her left elbow, left side and left hip. T.32-33.

Petitioner reported the accident to her supervisor, Paul Cermak, the same day, advising she injured her left elbow, left hip, right hip side, and left side of her body. Petitioner completed an accident report on that day. After her fall Petitioner iced her elbow and left shoulder. T.33-37.

Petitioner testified that during the five years before this accident, she had no problems with her left hip or shoulder. She did undergo surgery to the cervical spine but during the six month period before November 16, 2012, she experienced no cervical issues.T.37-39.

After the accident, Petitioner did not seek immediate medical treatment thinking it would

go away and she would just "tough it out". Petitioner testified that after the accident she felt constant pain in her left shoulder, pain in her left elbow and left hip. Petitioner tried to treat the injuries on her own by getting massages and icing the affected areas at home. Petitioner testified that the pain did not go away. During this time, Petitioner developed pain in her right elbow.T.39-40.

Petitioner sought medical treatment with Dr. Nelson on April 29, 2013, and reported she injured her elbow and shoulder after falling at work. She advised the doctor that she had been icing her left elbow but had not received other medical care since the accident. Petitioner also reported she is experiencing left shoulder spasms, neck and jaw pain and stabbing pain in her back. Petitioner further reported that she had been using her right arm more since the accident and is experiencing sharp pain in her right arm for three to four months. Dr. Nelson diagnosed right medial epicondylitis and left chronic shoulder spasms. Dr. Nelson believed that Petitioner's back pain may have been an extension of her left shoulder issues.T.40-42.

Petitioner saw Dr. Matagaras on May 10, 2013, upon referral from Dr. Nelson. Petitioner reported neck and back pain and, after examining Petitioner, Dr. Matagaras diagnosed cervicalgia and cervical strain and ordered an MRI and possible injection.T.42-43.

Petitioner sought treatment with Dr. Samuel Park at DuPage Medical Group on May 13, 2013, reporting left shoulder pain and overcompensation in the right elbow due to her left side deficits. Dr. Park ordered x-rays of her left shoulder and right elbow. Dr. Park diagnosed her with right tennis elbow and a left shoulder strain related to the November 16, 2012, fall. On May 13, 2013, Dr. Park administered a left shoulder injection and a right elbow injection. She was instructed to follow up in six weeks. An MRI scan was also performed on May 13, 2013, to determine if the hardware from her prior fusion was intact.T.42-46.

Petitioner saw Dr. Sayeed at DuPage Medical Group on May 22, 2013, and reported low back pain radiating down her legs. Petitioner reported she was taking Norco and Flexaril. She was diagnosed with lumbar radiculopathy and Dr. Sayeed administered an injection to the lumbar spine. Petitioner followed up with Dr. Sayeed June 5, 2013, and reported some relief after the injection. Petitioner received a 2nd lumbar spine injection that day.T.46-48.

Petitioner followed up with Dr. Park on June 6, 2013, and reported she was still having left shoulder pain. Dr. Park administered another left shoulder injection. (PX 1).

On August 27, 2013, Petitioner sought treatment with Dr. Ronjon Paul and advised that her back pain was still bothering her. Petitioner was referred to physical therapy. Petitioner underwent 7 sessions of physical therapy at Turner Pain & Wellness from September 12, 2013, through October 15, 2013, reporting ongoing shoulder and low back pain.T.48-49.

Petitioner was referred to Dr. Troy Karlsson whom she saw on October 28, 2013. Petitioner reported ongoing left shoulder problems since November 16, 2012, and the shoulder injections had not provided her enough relief. Dr. Karlsson referred Petitioner for an EMG/NCV which was performed November 6, 2013. The EMG showed mild left median mononeuropathy (CTS) and mild left radial motor neuropathy. (PX 1) Dr. Karlsson diagnosed Petitioner with left CTS and left

radial motor neuropathy and trigger points in the left parascapular region. Petitioner returned to Dr. Karlsson November 18, 2013, and they discussed additional trigger point injections. Petitioner was next referred to Dr. Fajardo whom she saw on November 22, 2013. She reported pain in the left shoulder since November 16, 2012, and that the pain was radiating down the left side of her neck. Dr. Fajardo referred Petitioner for trigger point injections.T.49.-52.

Petitioner treated with Dr. Bardfield on December 2, 2013, who administered two trigger point injections in her left scapula near her neck. Petitioner returned to Dr. Bardfield on December 9, 2013, and he administered two additional trigger point injections into her left scapula. Petitioner saw Dr. Fajardo on January 15, 2014, and reported that the injections had helped a little, but she still had pain in her left scapular region. Dr. Fajardo ordered an MRI of her left scapula, which was performed January 20, 2014. She again saw Dr. Fajardo on January 24, 2014 and reported that her left shoulder pain had not improved. Dr. Fajardo recommended complete rest of her left shoulder and a third set of trigger point injections. He also recommended that Petitioner take a month off of work.T.52.-54.

Petitioner returned for a follow-up appointment with Dr. Bardfield on February 21, 2014, and he administered a 3rd set of trigger point injections, one in her left trapezius, one in her left parascapular region, and one in her right elbow.T.54.

On August 2, 2014, Petitioner was walking towards the interface to turn a carton and sustained a second accident, filed as claim 14 WC 27826. Petitioner testified it was a shift change and the prior shift may have spilled water and she did not see it. While walking, she slid and extended her legs landing on the machine with her left elbow.T.54-55.

The Commission notes that Respondent did not dispute causal connection regarding the Petitioner's left arm, right arm and left shoulder conditions, only causal connection regarding the cervical and lumbar conditions was disputed.

The Commission notes there was no evidence presented of Petitioner having any prior lumbar issues or treatment, and she was doing well from her prior cervical issue just a month before the accident. Petitioner testified of an injury to her arms and shoulder but made no mention of injury to her cervical or lumbar spine. In fact, Petitioner testified she did not injure her neck as a result of the fall. (T. 80) Petitioner's initial medical April 29, 2013, some five months later, then noted cervical and lumbar complaints. There were no cervical and lumbar diagnoses rendered until May 2013 of cervicalgia and cervical strain and lumbar radiculopathy. Further, Petitioner reported to Dr. Sayeed on May 22, 2013, that her pain in her low back and neck began 4-6 weeks after she fell in November. (PX1)

The Commission finds compelling that Petitioner testified she did not injure her neck when she fell. Further, the Commission finds significant that Petitioner reported to Dr. Sayeed that her cervical and lumbar complaints began 4-6 weeks after the accident.

The Commission finds Petitioner has met the burden of proving a causal relationship between the work accident and her left and right arms, and left shoulder conditions of ill-being. The Commission, herein, affirms and adopts the decision as to a causal relationship between

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Petitioner's left arm, right arm and left shoulder injuries from this accident.

The Commission further finds that Petitioner failed to prove by a preponderance of the evidence that her cervical and lumbar conditions of ill-being are causally related and reverses the decision of the Arbitrator and finds the cervical and lumbar issues are not related to the work accident.

The Commission, with the above finding on causal connection between Petitioner's cervical and lumbar spine conditions and the work related accident, vacates the award for medical expenses for treatment for the cervical and lumbar conditions. The Commission, further, vacates the permanent partial disability award regarding the cervical and lumbar conditions.

The Commission finds, regarding the left shoulder condition,

> §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) The reported level of impairment pursuant to subsection (a). Neither party submitted an impairment rating, this factor is therefore given no weight.
>
> (ii) The occupation of the injured employee. Petitioner was a machine operator/machine setter. Petitioner no longer works for Respondent as she was terminated around March 2015 due to safety violations. There is no indication Petitioner was unable to have otherwise continued to work for Respondent or anywhere else. This factor is given little weight.
>
> (iii) The age of the employee at the time of the injury. Petitioner was 56 years old. Petitioner arguably has some years of working life, but there is no evidence she tried to obtain work after being terminated. This factor is given some weight.
>
> (iv) The employee's future earning capacity. There is no evidence presented as to future earnings as Petitioner has not apparently sought or obtained alternative employment. This factor is given no weight.
>
> (v) Evidence of disability corroborated by the treating medical records. Petitioner testified that she currently experiences pain in her left shoulder at about 7/10. Her pain varies day-to-day, depending on what she is doing; the pain could be 2-8/10. (T.57-60). This factor is given greater weight.

The Commission finds Petitioner entitled to an award of 7.5% loss of use of her person as a whole for injuries sustained to her left shoulder as a result of the work-related accident. (37.5 weeks at $548.88 per week = $20,583.00 total-MAW).

The Commission affirms the award of 4% loss of use of Petitioner's right arm, net after the credit from the prior settlement in case 07 WC 43733, (for a net 10.12 weeks at $548.88 per week = $5,554.67 total-right arm).(Total to date 16.5% loss of use of the right arm between the prior and this accident).

The Commission, regarding the left arm condition, finds the same determinations under §8.1(b) as to factors (i) through (iv) noted above.

The Commission finds as to factor (v),

> (v) Evidence of disability corroborated by the treating medical records. Petitioner suffered basically a left elbow contusion from her fall and, per Petitioner's testimony, she had not received other medical care regarding her left elbow since the accident.T.40-42. This factor is given greater weight.

The Commission herein, affirms the finding of causal connection to Petitioner's left arm. Petitioner had received an award of 30% loss of use of the left arm from the prior settled case, 91 WC 54872. The Commission finds that Petitioner failed to prove she was entitled to any further permanent partial disability, and, herein, vacates the Arbitrator's award regarding the left arm.

IT IS THEREFORE ORDERED BY THE COMMISSION, with finding Petitioner failed to prove casual connection between the work accident and her cervical and lumbar conditions, the Arbitrator's award of medical expenses and the PPD award regarding those conditions are, herein, vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $548.88 per week for a period of 47.62 total weeks, as provided in §8(d)(2) and 8(e) of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of Petitioner's person as a whole (37.5 weeks) for injuries sustained to Petitioner's left shoulder, 4% loss of use of Petitioner's right arm (10.12 weeks). The award for the left arm is, herein, vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner for the medical services rendered to the left arm, right arm and left shoulder, by DuPage Medical Group, Turner Pain & Wellness, and Hinsdale Orthopedics in PX 1, PX 2, and PX 4, pursuant to Sections 8(a) and 8.2 of the Act, and subject to the fee schedule incurred prior to and including April 19, 2014 and excluding services for CTS. Respondent shall receive a credit, pursuant to Section 8(j) of the Act for medical benefits paid by private group insurance and shall hold Petitioner harmless from any claims by any providers for services for which Respondent is receiving a credit under Section 8(j) of the Act. Medical expenses regarding the cervical and lumbar treatment are herein denied.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 15 2021
o-11/24/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

APELES, PAULA
Employee/Petitioner

Case# **13WC020679**

14WC027826

GRAPHICS PACKAGING INTERNATIONAL INC
Employer/Respondent

21IWCC0025

On 10/19/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0787 MEYERS & FLOWERS LLC
JEFFREY M REED
3 N 2ND ST SUITE 300
ST CHARLES, IL 60174

2025 DOHERTY & PROGER LLC
PATRICK W MARTIN
200 W ADAMS ST SUITE 2220
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Paula Apeles
Employee/Petitioner

v.

Graphic Packaging International, Inc.
Employer/Respondent

Case # **13** WC **20679**

Consolidated cases: **14 WC 27826**

21IWCC0025

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 **Elgin (Wheaton) and Chicago**, on **June 19, 2018 and August 9, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ 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 16, 2012,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$47,569.60**; the average weekly wage was **$914.80.**

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

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

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

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

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

ORDER

Petitioner has proven by the preponderance of the credible evidence that her current right elbow, left shoulder, lumbar and cervical spine conditions are causally connected to her work injury of November 16, 2012, as set forth in the Conclusions of Law attached herein.

The Respondent shall pay the Petitioner the sum of $548.88 per week for a further period of **67.71** weeks, as provided in Sections 8(d)2 and 8(e) of the Act because the injuries sustained caused loss of **use of the person** as a whole to the extent of **10%**, loss of use of **4%** of the **right arm**, and loss of use of **3%** of the **left arm**, as set forth in the Conclusions of Law attached herein.

Respondent shall pay the medical services provided by DuPage Medical Group, Turner Pain & Wellness and Hinsdale Orthopaedics as identified in Petitioner's exhibits PX 1, PX 2 and PX 4, pursuant to Sections 8(a) and 8.2 of the Act, and subject to the fee schedule incurred prior to and including April 29, 2014 and excluding services for the carpal tunnel syndrome. Respondent shall receive a credit, pursuant to Section 8(j) of the Act, for medical benefits paid by private group insurance and shall hold Petitioner harmless from any claims by any providers for services for which Respondent is receiving a credit under Section 8(j) of the Act, as set forth in the Conclusions of Law attached herein.

Respondent shall pay Petitioner compensation that has accrued from November 16, 2012 through August 9, 2018 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

OCT 19 2018

10/19/18
Date

PROCEDURAL HISTORY

This matter involves two cases (#13 WC 20679 and 14 WC 27826) which had been consolidated. The hearing started on June 19, 2018, before Arbitrator Frank Soto, in Wheaton, Illinois. The Arbitrator granted Respondent's oral motion to bifurcate the hearings and to submit evidence to establish Respondent's credit pursuant to Section 8(j). The consolidated cases were then reassigned to Arbitrator Soto and transferred to the Chicago. The trial reconvened and was completed on August 9, 2018. Regarding case #13 WC 20679 the issues dispute involve whether or not Petitioner's current condition of ill-being is causally related to her injury of November 16, 2012, whether respondent is liable for unpaid medical bills, the amount of the Section 8(j) credit Respondent is entitled to receive, in any, and the Nature and extend of Petitioner's injury. (Arb. Ex. #2).

FINDINGS OF FACT

Paula Apeles (hereinafter referred to as "Petitioner") testified that she worked for Graphic Packaging International (hereinafter referred to as "Respondent") from 1990 to 2015 as a machine operator. Petitioner is left handed. Petitioner testified that on November 16, 2012 she was injured after tripping over a box that was located next to a machine she was operating. Petitioner testified that she fell and landed on her left side striking her elbow and hip on the ground. Petitioner testified her left elbow, buttock and hip stung. Petitioner reported the accident to her supervisor. The accident report, introduced into evidence without objection, indicates that Petitioner tripped over a scrap box. It was noted on the Report that Petitioner's left elbow looked red. (PX 5).

Petitioner testified she continued to work, after the fall, and that her elbow and left shoulder began to hurt. Petitioner testified that she did not initially seek medical attention because she figured the pain would go away and she could "tuff it out". Petitioner testified the pain did not go away and she developed right elbow pain so she went to see her primary care physician, Dr. Nelson.

On November 29,2013, Petitioner was examined by Dr. Nelson. Petitioner reported falling forward and landing on her left elbow at work. Petitioner further reported chronic spasms in the left posterior shoulder/neck and left jaw. Petitioner indicated that she has been experiencing sharp pain in the right medial epicondyle area after using her right hand more at work. Petitioner reported the right-hand pain developed over the past 3-4 months. Petitioner also reported intermittent stabbing pain in her mid-back. Dr. Nelson noted decreased range of motion in the left shoulder due to triggering posterior shoulder spasms along the left scapula. Dr. Nelson further noted that Petitioner gets tearful when discussing her back pain. Dr. Nelson assessed right medical epicondylitis and left chronic shoulder spasm. Dr. Nelson issued lifting restrictions and referred Petitioner to an orthopedic physician for injections. Regarding the mid-back, Dr. Nelson believed the pain was an extension of her left shoulder spasm because the pain was occurring in the left medial inferior scapular boarder. (PX 1, RX 2).

On May 9, 2013, Petitioner treated with Dr. Samuel Park of LOM Orthopaedics. Petitioner reported falling at work on November 16, 2012 and landing on her left posterior elbow. Dr. Park noted that Petitioner had difficulty using her left arm fully. Petitioner also reported developing right-sided pain along the lateral elbow from lifting and carrying. Petitioner said she does a lot of repetitive lifting and carrying at work and she has been using her right arm to compensate for her left arm problems. Dr. Park performed an examination and found that Petitioner's left arm had strength was 4+/5 and had a positive impingement sign. Petitioner's right elbow showed lateral epicondylar tenderness and pain with wrist extensions. Petitioner was given cortisone injections into her subacromial space of the left shoulder and right elbow. Dr. Park's impression was left shoulder strain from a fall on November 16, 2012 and right tennis elbow. (PX 1).

Petitioner treated for her neck pain with Dr. Nicholas Mataragas on May 10, 2013. Dr. Mataragas noted that Petitioner had a prior C5-C7 anterior cervical discectomy and fusion surgery in 2011. During the examination Dr. Mataragrs noted mild tenderness to palpitation along the trapezius muscles and the C7 spinous process. Petitioner was tender to palpation along the paraspinal in the lower lumbar spine and she had painful back extensions. Dr. Mataragrs assessed cervicalgia status post anterior cervical discectomy fusion and cervical strain and L5 spondylolisthesis. Dr. Materagas ordered a lumbar MRI and referred Petitioner for pain treatment. (PX 1).

On May 22, 2013, Petitioner treated with Dr. Yousuf Sayeed of DuPage Medical Group. Petitioner reported low back pain radiating to her bilateral lower extremities for approximately five months. Petitioner indicted that the pain gradually developed in her lower back and neck during the weeks after her fall. The lumbar MRI revealed disc bulges at L3-L4, L4-L5, and L5-S1. Petitioner was assessed with multilevel disc bulges, lumbar radiculitis, spondylosis, and spondylolisthesis. Petitioner was given a lumbar epidural steroid injection and instructed to follow up in two to three weeks. (PX 1).

On June 5, 2013 Petitioner returned to Dr. Sayeed. Petitioner reported some relief from the lumbar injections. Petitioner was given a second lumbar epidural steroid injection. On June 6, 2013, Petitioner followed up with Dr. Park of DuPage Medical Group. Petitioner reported continued left posterior scapular trigger paint pain. Dr. Park administered medical periscapular trigger point injections. On August 27, 2013, Petitioner treated with Dr. Paul, of DuPage Medical Group, who believed Petitioner's pain was not caused by her cervical spine. Dr. Paul believed Petitioner's pain was caused by her shoulder condition. On September 11, 2013, Dr. Park assessed left rotator cuff tendinopathy, right tennis elbow and left acromioclavicular joint arthritis and referred Petitioner to Dr. Mark Turner. (PX 1). Petitioner treated with Dr. Turner, of turner Pain and Wellness Center, from September 12, 2013 through October 20, 2013. (PX 3).

Petitioner sought a second opinion for her left shoulder from Dr. Troy Karlsson of DuPage Medical Group. Petitioner reported ongoing left shoulder troubles since falling on her elbow at work in November of last year.

Dr. Karlsson assessed a periscapular muscle strain and ordered an EMG. Dr. Karlsson noted that Petitioner may need further trigger point injections. (PX 1). The EMG was abnormal showing mild left medical mononeuropathy across the wrist (carpal tunnel syndrome) involving only the sensory nerves, mild left radial motor neuropathy and trigger points in the left periscapular region. Petitioner is not claiming that her carpal tunnel syndrome is related to her work accident of November 16, 2012. Dr. Karlsson opined that Petitioner's left shoulder pain could be from the trigger points. Dr. Karlsson recommended additional trigger point injections including myofascial releases and dry needling therapy for the hand. (PX 1).

On November 22, 2013, Petitioner was examined by Dr. Fajardo at Hinsdale Orthpaedics. Petitioner reported throbbing, aching, consistent left shoulder and scapula pain since a November of 2012 work injury. Petitioner described the pain as over the posterior aspect of her neck with radiation down her trapezius and down the paraspinal muscles off the scapular blade. Dr. Fajardo noted tenderness over the paraspinal muscles over the rhomboids and paraspinal muscles. Dr. Fajardo assessed a left trapezial/rhomboid/paraspinal muscle strains which have been recalcitrant to therapy. Dr. Fajardo recommended additional possible trigger point injections. On December 2, 2013, Petitioner received two trigger pint injections, into the superior aspect of the left scapula, by Dr. Bardfield of Hinsdale Orthopaedics. On December 9, 2013, Petitioner returned for second set of trigger point injections into the left upper trapezius and left periscapular region. On January 15, 2014, Dr. Fajardo ordered a MRI of the left scapula. On January 21, 2014, Petitioner had the MRI which showed no osseous abnormalities or edema or fluid collections. On January 24, 2014, Petitioner returned to Dr. Fajardo who recommended complete rest of the left shoulder and additional trigger point injections. Dr. Fajardo noted that Petitioner was still working. On February 21, 2014, Petitioner returned to Dr. Bardfield for the trigger point injections. Dr. Bardfield's impression was cervical and periscapular myofascial pain with right lateral epicondylitis. Petitioner reported that she was going out of the country and she would follow up as needed. (PX 4).

On February 24, 2014, Petitioner returned to DuPage Medical Group as was treated by Dr. Isoniemi. Petitioner reported left shoulder, right elbow, and lower back pain. Dr. Isoniemi prescribed pain medicine and instructed Petitioner to follow up in two to three months. (PX 1).

On April 29, 2014, Petitioner was examined by Dr. Heller, pursuant to Section 12 of the Act. Petitioner reported injuries to her upper extremities, neck and back after tripping over a box while at work on November 16, 2012. Dr. Heller noted that Petitioner underwent a cervical spine fusion in 2009. Dr. Heller reviewed the records from who performed two injections, one into the left shoulder and one into the right elbow. Petitioner's symptoms improved after the injections. During the examination, Dr. Heller noted that Petitioner no longer has acute symptoms of the lateral epicondylitis. Petitioner reported pain in the medical scapula radiating towards her jaw. Petitioner's AC joint was also mildly tender to deep palpations. Dr. Heller also noted that Petitioner showed significant guarding and symptoms of the cervical spine with flexion or left sided Spurling's maneuver. Petitioner

reported that her cervical spine and periscapular pain with paresthesias radiating toward the left hand caused the most severe symptoms and complaints.

Dr. Heller opined that, based upon the history he had been provided, Petitioner suffered contusions to bilateral upper extremities on November 16, 2012, which includes the right elbow. Dr. Heller noted the Petitioner's current symptoms appear to be based more upon the cervical spine rather than left shoulder issues. Dr. Heller noted that he could not provide an opinion regarding Petitioner's cervical spine because that area is beyond the scope of his expertise. Dr. Heller opined that Petitioner's current left shoulder complaints are not related from Petitioner's November 16, 2012 accident because those complaints had resolved. Dr. Heller opined that Petitioner suffered injuries to her left shoulder and right elbow on November 16, 2012 which resolved. Dr. Heller said that he does not know whether Petitioner's current periscapular pain and left upper extremity paresthesias is related to the November 16, 2012 injury or related to Petitioner's previous cervical spine condition. Dr. Heller said that he could not address the issue because it involved the spine which was outside his area of expertise. Dr. Heller opined that additional medical treatment for the left shoulder and right elbow was not warranted. Dr. Heller further opined that medical treatment Petitioner received was appropriate and that Petitioner was at maximum medical improvement. (RX 19).

Petitioner testified that she was injured again at work on August 2, 2014. Petitioner testified that she was walking toward a machine and slipped on water which caused her to slide and overextended her legs and landing on a machine striking her left elbow. Petitioner reported the accident to John Covert. (TX p. 55-56).

Petitioner testified that she tried to treat her injuries with ice. On August 14, 2014, Petitioner returned to Dr. Isoniemi, of DuPage Medical Group. At that time, Petitioner reported average pain of 5 but pain level increases to 8 with increased activity. Dr. Isoniemi noted Petitioner had lumbosacral tenderness. On January 14, 2015, Petitioner followed up with Dr. Isoniemi reporting back pain since November 16, 2012. Petitioner underwent an MRI on January 15, 2015, which identified no significant changes in the findings since the Petitioner's May 13, 2013 MRI.[1] (RX 22). Petitioner was diagnosed with back pain and instructed to follow up with a neurosurgeon if her pain failed to improve. On January 21, 2015, Petitioner returned to Dr. Isoniemi complaining of left leg pain and possible radiculopathy. The straight leg raise test was negative. On January 29, 2015, Dr. Isoniemi diagnosed low back pain and prescribed Norco and instructed Petitioner to follow up with the pain clinic and a neurosurgeon. (PX 1).

On October 10, 2012, prior to Petitioner's November 16, 2012 injury, Petitioner attended a post status C5 to C7 anterior cervical discectomy and fusion surgery follow up appointment with Dr. Paul, of Spine Center

1. [1] The impression of the MRI dated 1/15/15: multilevel degenerative disease of the lumbar spine. There is slight neural foraminal narrowing at the L3-L4, L4-L5 and L5-S1 levels. Central canal is widely patent at all lumbar levels. There has been no significant change in findings since the 5/13/13 MRI.

of DuPage Medical. In the records, Dr. Paul noted Petitioner's left arm pain was essentially gone and her arm strength was within normal limits. Dr. Paul also noted that Petitioner was thrilled with how she is doing. (PX 2).

Petitioner testified that her current left shoulder pain was at 7 but the pain ranges between 2 and 8 depending upon her activities. Petitioner's rated her left elbow pain as 5. Petitioner testified that she no longer experiences pain in her right elbow, but he does still experience stiffness. Petitioner testified that she continues to experience pain in her low back.

Petitioner testified that her employment was terminated after being written up for the way she operated one of the machines. Petitioner previously filed and settled claims involving specific losses pursuant to Section 8(e) of the Act. Petitioner settled case #91 WC 54872 for 30% loss of use of a left arm and case #07 WC 43732 for 12.5% loss of use of a right arm. (RX 25, 27).

The Arbitrator found the testimony of Petitioner credible.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

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

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982). If a pre-existing condition is aggravated, exacerbated or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Construction v. Industrial Commission*, 227 N.E.2d 2d 65, 67, 68 (1967), see also *Illinois Valley Irrigation v. Industrial Commission*, 362 N.E.2d 339 (1977). When a pre-existing condition is present, a claimant must show that a work related accidental injury aggravated or accelerated the pre-existing condition such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury. *St. Elizabeth Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272, 273 (5th Dist. 2007). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly

inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner has proven by the preponderance of the credible evidence that her current right elbow, left shoulder, lumbar and cervical spine conditions are causally connected to her work injury of November 16, 2012, set forth more fully below.

Dr. Heller, who performed the Section 12 examination, opined that Petitioner sustained an injury to her right elbow and left shoulder on November 16, 2016 and that her symptoms resolved. Dr. Heller opined that Petitioner's current symptoms were related to the cervical spine which was outside the area of his expertise. Dr. Heller also did not provide an opinion regarding Petitioner's low back condition.

Petitioner testified that prior to her November 16, 2012 fall she was feeling fine and she was not under medical care for her cervical spine or any other body parts. Dr. Paul's October 10, 2012 medical record supports Petitioner's testimony. On that day, Petitioner saw Paul to follow up on her C5-C7 anterior discectomy and fusion surgery. Dr. Paul noted that Petitioner was essentially pain free, Petitioner was thrilled with how she was doing and her left arm strength was within normal limits. (PX 2).

After her November 16, 2012 accident, Petitioner's condition deteriorated, and she developed additional symptoms. Dr. Park diagnosed right tennis elbow secondary to Petitioner's November 16, 2012 fall at work. Dr. Heller acknowledged that Petitioner's right elbow injury was related to her fall at work on November 16, 2012. Dr. Park also diagnosed a left shoulder strain. Dr. Heller also acknowledged that Petitioner's sustained a left contusion was related to her fall at work on November 16, 2012. Dr. Heller unable to proffer an opinion regarding the Petitioner's complaints regarding her periscapular pain and left upper extremity paresthesias because, he believed, those complaints could be related to Petitioner's cervical spine, which was outside of his area of expertise. Drs. Nelson, Karlsson Mataragas and Fajardo believed Petitioner's back pain complaints were an extension of her left shoulder spasms. Dr. Mataragas diagnosed Petitioner with cervicalgia, a cervical strain, and spondylolisthesis. Dr. Karlsson ordered an EMG, which showed that Petitioner had trigger points in her left periscapular region. Dr. Fajardo noted that Petitioner's trapezoidal, rhomboid, and paraspinal muscle strains were related to her injury of November of 2012. The Arbitrator finds the opinions of Drs. Farado, Park, Mataragas, Karlsson and Nelson to be more persuasive than the opinions of Dr. Heller regarding the cause of Petitioner's ongoing symptoms. Dr. Heller did not address the cause of Petitioner's current symptoms. Dr. Heller believed the symptoms involved the cervical spine, which as outside his area of expertise.

Prior to Dr. Heller's April 29, 2014 examination, Petitioner received trigger point injections and cortisone injections in the left shoulder, lumbar area, right elbow and trapezoidal and paraspinal muscle areas. Dr. Heller

opined that Petitioner's prior treatment was appropriate. Petitioner testified that her lumbar condition was caused by her fall at work on November 16, 2012. Petitioner was not receiving medical treatment for her low back prior to her November 16, 2012 work accident. Respondent did not proffer any testimony that Petitioner's low back symptoms were not related to her November 16, 2012 injury. Petitioner testified that she fell on her left hip and that pain radiated from her hip and developed into lower back pain and discomfort (TX p. 73, 80). Petitioner gave that same account to Dr. Sayeed and Kathleen Rogowski, PA, who then diagnosed Petitioner with multilevel disc bulges, lumbar radiculitis, spondylosis, and spondylolisthesis (PX 1).

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

Pursuant to Section 8(a) of the Act, the employer shall pay all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services which are reasonably required to cure or relieve the employee from the effects of the accidental injury. Respondent did not proffer evidence the medical treatment Petitioner received was not reasonable or necessary. Respondent disputed liability for the medical treatment. (Arb. #x# 20). As stated above, the Arbitrator finds that Petitioner's left shoulder, right elbow, cervical and lumbar spine were causally connected to her work injury of November 16, 2012. As such, the Arbitrator further finds that Petitioner's treatment was necessary and reasonably required to cure or relieve Petitioner from the effects of her injury. Respondent shall pay the medical services provided by DuPage Medical Group, Turner Pain & Wellness and Hinsdale Orthopaedics as identified in Petitioner's exhibits PX 1, PX 2 and PX 4, pursuant to Sections 8(a) and 8.2 of the Act, and subject to the fee schedule for the treatment provided to Petitioner to April 29, 2014 excluding the treatment provided for the carpal tunnel syndrome. Respondent shall receive a credit, pursuant to Section 8(j) of the Act, for medical benefits paid by private group insurance or other entity and Respondent shall hold Petitioner harmless from any claims by any providers for services for which Respondent is receiving a credit under Section 8(j) of the Act.

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

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability ("PPD"), for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all 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 regards to paragraph (i) of Section 8.1(b) of the Act. A report of impairment was not introduced into evidence. As such the Arbitrator gives this factor no weight.

With regards to paragraph (ii) of the Act, the occupation of the employee. Petitioner's was employed as a machine operator. Petitioner did not proffer evidence regarding the physical demand of this occupation. The Arbitrator notes that Petitioner worked for Respondent for 25 years and she sustained several work-related injuries including to both arms. Petitioner testified that she operated several machines. The Arbitrator gives this factor some weight.

With regards to paragraph (iii) of the Act, the age of the employee. Petitioner was 56 years old at the time of her injury. Petitioner was of a relatively advanced age. Individuals of advanced aged tend to experience greater difficulty recovering from the effects of their injuries. The Arbitrator gives this factor great weight.

With regards to paragraph (iv) of the Act, the employee's future earning capacity. Petitioner continued to work for Respondent until being terminated for unrelated reasons. Petitioner did not proffer evidence that Petitioner's future earning capacity has been adversely impacted as a result her condition. As such, the Arbitrator gives this factor little weight.

With regards to paragraph (v), evidence of disability corroborated by the medical records. The Arbitrator finds that Petitioner's evidence of disability was corroborated by the medical records. Petitioner testified that she no longer experiences pain in her right elbow. Petitioner told various doctors that she was receiving relief from the trigger point injections and cortisone injections. Petitioner consistently told doctors of the pain at the base of her cervical spine that radiates down into the left trapezoidal, rhomboid, and paraspinal muscles. The doctors may disagree regarding whether the pain is caused by the shoulder or neck, the complaints are consistent. The Arbitrator gives this factor great weight.

Based upon the record, taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% of a person as a whole for her cervical and lumbar conditions, pursuant to Section 8(d)(2) of the Act. The Arbitrator further finds that Petitioner suffered permanent partial disability of 4 % loss of use of a right arm, after crediting Respondent for the prior settlement involving the right arm in Case #07 WC 43732, and 3% loss of use of the left arm, after crediting Respondent for the prior settlement involving the left arm in Case #91 WC 54872, pursuant to Section 8(e) of the Act.

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 Choose reason	☐ Second Injury Fund (§8(e)18)
X vacate medical bills award	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PAULA APELES,

Petitioner,

vs. NO: 14 WC 27826

GRAPHICS PACKAGING,

Respondent.

21IWCC0026

DECISION AND OPINION ON REVIEW

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

The Commission affirms the Arbitrator's finding Petitioner failed to prove her current condition of ill-being is related to the accident of August 2, 2014. Petitioner sustained a temporary aggravation of a pre-existing condition and her current condition is related to Petitioner's November 16, 2012, companion case, filed as 13 WC 20679. The Commission, therefore, modifies the decision to vacate the medical expenses awarded in this case. Medical expenses are addressed in case 13 WC 20679.

IT IS THEREFORE ORDERED BY THE COMMISSION that the medical expense award is, herein, vacated. All else is 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

21IWCC0026

for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 15 2021
o-11/24/20
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

APELES, PAULA
Employee/Petitioner

Case# **14WC027826**

13WC020679

GRAPHICS PACKAGING INTERNATIONAL INC
Employer/Respondent

21IWCC0026

On 10/19/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0787 MEYERS & FLOWERS LLC
JEFFREY M REED
3 N 2ND ST SUITE 300
ST CHARLES, IL 60174

2025 DOHERTY & PROGER LLC
PATRICK W MARTIN
200 W ADAMS ST SUITE 2220
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Paula Apeles
Employee/Petitioner

v.

Graphic Packaging International, Inc.
Employer/Respondent

Case # **14** WC **27826**

Consolidated cases: **13 WC 20679**

21IWCC0026

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 **Elgin (Wheaton) and Chicago**, on **June 19, 2018 and August 9, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 2, 2014**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$45,718.40**; the average weekly wage was **$879.20**.

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

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

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

Respondent shall be given a credit of **$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 medical treatment provided by Dr. Isoniemi and the services provided by DuPage Medical Group, from August 14, 2014 through January 29, 2015, as identified in Petitioner's exhibits PX 1, pursuant to Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. Respondent shall receive a credit, pursuant to Section 8(j) of the Act, for medical benefits paid by private group insurance and shall hold Petitioner harmless from any claims by any providers for services for which Respondent is receiving a credit under Section 8(j) of the Act, as set forth in the Conclusions of Law attached herein.

Respondent shall pay Petitioner compensation that has accrued from August 2, 2014 through August 9, 2018 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

6/19/18
Date

OCT 19 2018

PROCEDURAL HISTORY

This matter involves two cases (#13 WC 20679 and 14 WC 27826) which had been consolidated. On June 19, 2018, the trial began before Arbitrator Frank Soto, who was sitting in Wheaton, Illinois. The Arbitrator granted Respondent's oral motion to bifurcate the hearings and to submit evidence to establish Respondent's credit pursuant to Section 8(j). The consolidated cases were then reassigned to Arbitrator Soto and transferred to the Chicago. The trial reconvened and was completed on August 9, 2018. Regarding case #14 WC 27826 the disputed issues involve whether Petitioner's current condition of ill-being are causally related to her injury of August 2, 2014, whether respondent is liable for unpaid medical bills and the amount of the Section 8(j) credit Respondent is entitled to receive, in any. The Nature and extend of Petitioner's injury is also at issue. (Arb. Ex. #1).

FINDINGS OF FACT

Paula Apeles (hereinafter referred to as "Petitioner") testified that she worked for Graphic Packaging International (hereinafter referred to as "Respondent") from 1990 to 2015 as a machine operator. Petitioner is left handed. Petitioner testified that on November 16, 2012 she was injured after tripping over a box that was located next to a machine she was operating. Petitioner testified that she fell and landed on her left side striking her elbow and hip on the ground. Petitioner testified her left elbow, buttock and hip stung. Petitioner reported the accident to her supervisor. The accident report, introduced into evidence without objection, indicates that Petitioner tripped over a scrap box. It was noted on the Report that Petitioner's left elbow looked red. (PX 5).

Petitioner testified she continued to work, after the fall, and that her elbow and left shoulder began to hurt. Petitioner testified that she did not initially seek medical attention because she figured the pain would go away and she could "tuff it out". Petitioner testified the pain did not go away and she developed right elbow pain, so she went to see her primary care physician, Dr. Nelson.

On November 29,2013, Petitioner was examined by Dr. Nelson. Petitioner reported falling forward and landing on her left elbow at work. Petitioner further reported chronic spasms in the left posterior shoulder/neck and left jaw. Petitioner indicated that she has been experiencing sharp pain in the right medial epicondyle area after using her right hand more at work. Petitioner reported the right-hand pain developed over the past 3-4 months. Petitioner also reported intermittent stabbing pain in her mid-back. Dr. Nelson noted decreased range of motion in the left shoulder due to triggering posterior shoulder spasms along the left scapula. Dr. Nelson further noted that Petitioner gets tearful when discussing her back pain. Dr. Nelson assessed right medical epicondylitis and left chronic shoulder spasm. Dr. Nelson issued lifting restrictions and referred Petitioner to an

orthopedic physician for injections. Regarding the mid-back, Dr. Nelson believed the pain was an extension of her left shoulder spasm because the pain was occurring in the left medial inferior scapular boarder. (PX 1, RX 2).

On May 9, 2013, Petitioner treated with Dr. Samuel Park of LOM Orthopaedics. Petitioner reported falling at work on November 16, 2012 and landing on her left posterior elbow. Dr. Park noted that Petitioner had difficulty using her left arm fully. Petitioner also reported developing right-sided pain along the lateral elbow from lifting and carrying. Petitioner said she does a lot of repetitive lifting and carrying at work and she has been using her right arm to compensate for her left arm problems. Dr. Park performed an examination and found that Petitioner's left arm had strength was 4+/5 and had a positive impingement sign. Petitioner's right elbow showed lateral epicondylar tenderness and pain with wrist extensions. Petitioner was given cortisone injections into her subacromial space of the left shoulder and right elbow. Dr. Park's impression was left shoulder strain from a fall on November 16, 2012 and right tennis elbow. (PX 1).

Petitioner treated for her neck pain with Dr. Nicholas Mataragas on May 10, 2013. Dr. Mataragas noted that Petitioner had a prior C5-C7 anterior cervical discectomy and fusion surgery in 2011. During the examination Dr. Mataragrs noted mild tenderness to palpitation along the trapezius muscles and the C7 spinous process. Petitioner was tender to palpation along the paraspinal in the lower lumbar spine and she had painful back extensions. Dr. Mataragrs assessed cervicalgia status post anterior cervical discectomy fusion and cervical strain and L5 spondylolisthesis. Dr. Materagas ordered a lumbar MRI and referred Petitioner for pain treatment. (PX 1).

On May 22, 2013, Petitioner treated with Dr. Yousuf Sayeed of DuPage Medical Group. Petitioner reported low back pain radiating to her bilateral lower extremities for approximately five months. Petitioner indicted that the pain gradually developed in her lower back and neck during the weeks after her fall. The lumbar MRI revealed disc bulges at L3-L4, L4-L5, and L5-S1. Petitioner was assessed with multilevel disc bulges, lumbar radiculitis, spondylosis, and spondylolisthesis. Petitioner was given a lumbar epidural steroid injection and instructed to follow up in two to three weeks. (PX 1).

On June 5, 2013 Petitioner returned to Dr. Sayeed. Petitioner reported some relief from the lumbar injections. Petitioner was given a second lumbar epidural steroid injection. On June 6, 2013, Petitioner followed up with Dr. Park of DuPage Medical Group. Petitioner reported continued left posterior scapular trigger paint pain. Dr. Park administered medical periscapular trigger point injections. On August 27, 2013, Petitioner treated with Dr. Paul, of DuPage Medical Group, who believed Petitioner's pain was not caused by her cervical spine. Dr. Paul believed Petitioner's pain was caused by her shoulder condition. On September 11, 2013, Dr. Park assessed left rotator cuff tendinopathy, right tennis elbow and left acromioclavicular joint arthritis and referred

Petitioner to Dr. Mark Turner. (PX 1). Petitioner treated with Dr. Turner, of turner Pain and Wellness Center, from September 12, 2013 through October 20, 2013. (PX 3).

Petitioner sought a second opinion for her left shoulder from Dr. Troy Karlsson of DuPage Medical Group. Petitioner reported ongoing left shoulder troubles since falling on her elbow at work in November of last year. Dr. Karlsson assessed a periscapular muscle strain and ordered an EMG. Dr. Karlsson noted that Petitioner may need further trigger point injections. (PX 1). The EMG was abnormal showing mild left medical mononeuropathy across the wrist (carpal tunnel syndrome) involving only the sensory nerves, mild left radial motor neuropathy and trigger points in the left periscapular region. Petitioner is not claiming that her carpal tunnel syndrome is related to her work accident of November 16, 2012. Dr. Karlsson opined that Petitioner's left shoulder pain could be from the trigger points. Dr. Karlsson recommended additional trigger point injections including myofascial releases and dry needling therapy for the hand. (PX 1).

On November 22, 2013, Petitioner was examined by Dr. Fajardo at Hinsdale Orthpaedics. Petitioner reported throbbing, aching, consistent left shoulder and scapula pain since a November of 2012 work injury. Petitioner described the pain as over the posterior aspect of her neck with radiation down her trapezius and down the paraspinal muscles off the scapular blade. Dr. Fajardo noted tenderness over the paraspinal muscles over the rhomboids and paraspinal muscles. Dr. Fajardo assessed a left trapezial/rhomboid/paraspinal muscle strains which have been recalcitrant to therapy. Dr. Fajardo recommended additional possible trigger point injections. On December 2, 2013, Petitioner received two trigger pint injections, into the superior aspect of the left scapula, by Dr. Bardfield of Hinsdale Orthopaedics. On December 9, 2013, Petitioner returned for second set of trigger point injections into the left upper trapezius and left periscapular region. On January 15, 2014, Dr. Fajardo ordered a MRI of the left scapula. On January 21, 2014, Petitioner had the MRI which showed no osseous abnormalities or edema or fluid collections. On January 24, 2014, Petitioner returned to Dr. Fajardo who recommended complete rest of the left shoulder and additional trigger point injections. Dr. Fajardo noted that Petitioner was still working. On February 21, 2014, Petitioner returned to Dr. Bardfield for the trigger point injections. Dr. Bardfield's impression was cervical and periscapular myofascial pain with right lateral epicondylitis. Petitioner reported that she was going out of the country and she would follow up as needed. (PX 4).

On February 24, 2014, Petitioner returned to DuPage Medical Group as was treated by Dr. Isoniemi. Petitioner reported left shoulder, right elbow, and lower back pain. Dr. Isoniemi prescribed pain medicine and instructed Petitioner to follow up in two to three months. (PX 1).

On April 29, 2014, Petitioner was examined by Dr. Heller, pursuant to Section 12 of the Act. Petitioner reported injuries to her upper extremities, neck and back after tripping over a box while at work on November 16, 2012. Dr. Heller noted that Petitioner underwent a cervical spine fusion in 2009. Dr. Heller reviewed the records

from who performed two injections, one into the left shoulder and one into the right elbow. Petitioner's symptoms improved after the injections. During the examination, Dr. Heller noted that Petitioner no longer has acute symptoms of the lateral epicondylitis. Petitioner reported pain in the medical scapula radiating towards her jaw. Petitioner's AC joint was also mildly tender to deep palpations. Dr. Heller also noted that Petitioner showed significant guarding and symptoms of the cervical spine with flexion or left sided Spurling's maneuver. Petitioner reported that her cervical spine and periscapular pain with paresthesias radiating toward the left hand caused the most severe symptoms and complaints.

Dr. Heller opined that, based upon the history he had been provided, Petitioner suffered contusions to bilateral upper extremities on November 16, 2012, which includes the right elbow. Dr. Heller noted the Petitioner's current symptoms appear to be based more upon the cervical spine rather than left shoulder issues. Dr. Heller noted that he could not provide an opinion regarding Petitioner's cervical spine because that area is beyond the scope of his expertise. Dr. Heller opined that Petitioner's current left shoulder complaints are not related from Petitioner's November 16, 2012 accident because those complaints had resolved. Dr. Heller opined that Petitioner suffered injuries to her left shoulder and right elbow on November 16, 2012 which resolved. Dr. Heller said that he does not know whether Petitioner's current periscapular pain and left upper extremity paresthesias is related to the November 16, 2012 injury or related to Petitioner's previous cervical spine condition. Dr. Heller said that he could not address the issue because it involved the spine which was outside his area of expertise. Dr. Heller opined that additional medical treatment for the left shoulder and right elbow was not warranted. Dr. Heller further opined that medical treatment Petitioner received was appropriate and that Petitioner was at maximum medical improvement. (RX 19).

Petitioner testified that she was injured again at work on August 2, 2014. Petitioner testified that she was walking toward a machine and slipped on water which caused her to slide and overextended her legs and landing on a machine striking her left elbow. Petitioner reported the accident to John Covert. (TX p. 55-56).

Petitioner testified that she tried to treat her injuries with ice. On August 14, 2014, Petitioner returned to Dr. Isoniemi, of DuPage Medical Group. At that time, Petitioner reported average pain of 5 but pain level increases to 8 with increased activity. Dr. Isoniemi noted Petitioner had lumbosacral tenderness. On January 14, 2015, Petitioner followed up with Dr. Isoniemi reporting back pain since November 16, 2012. Petitioner underwent an MRI on January 15, 2015, which identified no significant changes in the findings since the Petitioner's May 13, 2013 MRI.[1] (RX 22). Petitioner was diagnosed with back pain and instructed to follow up

1. [1] The impression of the MRI dated 1/15/15: multilevel degenerative disease of the lumbar spine. There is slight neural foraminal narrowing at the L3-L4, L4-L5 and L5-S1 levels. Central canal is widely patent at all lumbar levels. There has been no significant change in findings since the 5/13/13 MRI.

with a neurosurgeon if her pain failed to improve. On January 21, 2015, Petitioner returned to Dr. Isoniemi complaining of left leg pain and possible radiculopathy. The straight leg raise test was negative. On January 29, 2015, Dr. Isoniemi diagnosed low back pain and prescribed Norco and instructed Petitioner to follow up with the pain clinic and a neurosurgeon. (PX 1).

On October 10, 2012, prior to Petitioner's November 16, 2012 injury, Petitioner attended a post status C5 to C7 anterior cervical discectomy and fusion surgery follow up appointment with Dr. Paul, of Spine Center of DuPage Medical. In the records, Dr. Paul noted Petitioner's left arm pain was essentially gone and her arm strength was within normal limits. Dr. Paul also noted that Petitioner was thrilled with how she is doing. (PX 2).

Petitioner testified that her current left shoulder pain was at 7 but the pain ranges between 2 and 8 depending upon her activities. Petitioner's rated her left elbow pain as 5. Petitioner testified that she no longer experiences pain in her right elbow, but he does still experience stiffness. Petitioner testified that she continues to experience pain in her low back.

Petitioner testified that her employment was terminated after being written up for the way she operated one of the machines. Petitioner previously filed and settled claims involving specific losses pursuant to Section 8(e) of the Act. Petitioner settled case #91 WC 54872 for 30% loss of use of a left arm and case #07 WC 43732 for 12.5% loss of use of a right arm. (RX 25, 27).

The Arbitrator found the testimony of Petitioner credible.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

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

An accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 797 N.E.2d 665, 672 (2003). Employers are to take their employees as they find them. *A.C.&S v. Industrial Commission*, 710 N.E.2d 8347 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (1982). If a pre-existing condition is aggravated, exacerbated or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Construction v. Industrial Commission*, 227 N.E.2d 2d 65, 67, 68 (1967), see also *Illinois Valley Irrigation v. Industrial Commission*, 362 N.E.2d 339 (1977). When a pre-existing condition

is present, a claimant must show that a work related accidental injury aggravated or accelerated the pre-existing condition such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury. *St. Elizabeth Hospital v. Workers' Compensation Commission,* 864 N.E.2d 266, 272, 273 (5th Dist. 2007). Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with all testimony. The Arbitrator concludes that Petitioner failed to prove that her current condition of ill-being is causally connected to her injury August 2, 2014, as set forth more fully below.

Petitioner was examined by Dr. Isoniema on August 14, 2014. It was the first date Petitioner received medical treatment after her accident of August 2, 2014. Petitioner did not report a new injury to Dr. Isoniema. The medical records do not show that Petitioner's condition was aggravated, worsen or Petitioner developed new complaints. This fact does not negate that Petitioner fell at work on August 2, 2014. The Arbitrator finds that Petitioner suffered a temporary aggravation of her condition that did not create an additional permanency to her condition. The Arbitrator found, in Case #13 WC 20679, that Petitioner's current condition of ill-being was causally related to her accident of November 16, 2012.

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

Pursuant to Section 8(a) of the Act, the employer shall pay all necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services which are reasonably required to cure or relieve the employee from the effects of the accidental injury. Respondent did not proffer evidence the medical treatment Petitioner received for her low back was not reasonable or necessary. The Arbitrator finds that Petitioner low back treatment was necessary and reasonably required to cure or relieve Petitioner from the effects of the injury. Petitioner suffered a temporary aggravation of her condition without evidence of permanency sufficient to justify the treatment Petitioner received after August 14, 2014. As such the Respondent shall pay the medical treatment

provided by Dr. Isoniemi and the services provided by DuPage Medical Group, from August 14, 2014 through January 29, 2015, as identified in Petitioner's exhibits PX 1, pursuant to Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. Respondent shall receive a credit, pursuant to Section 8(j) of the Act, for medical benefits paid by private group insurance and shall hold Petitioner harmless from any claims by any providers for services for which Respondent is receiving a credit under Section 8(j) of the Act.

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

In light of the Arbitrator's findings in Section (F) above, the Arbitrator need not address the nature and extend of Petitioner's injury.

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

JASON FILBURN,

Petitioner,

vs. NO: 11 WC 036342

SANGAMON COUNTY SHERIFF,

Respondent.

21IWCC0027

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the appellate court. The sole issue on remand is the denial of medical expenses incurred by Petitioner after June 12, 2012. The appellate court ruled as follows: " (W)e vacate that portion of the circuit court's judgment that confirmed the Commission's finding that the claimant was not entitled to medical expenses incurred after June 12, 2012, and affirm the circuit court's judgment in all other respects; reverse the portion of the Commission's decision finding that the claimant was not entitled to medical expenses incurred after June 12, 2012; and remand the matter to the Commission to determine what medical expenses, if any, after June 12, 2012, to alleviate pain are causally related to his work accident of April 25, 2011 and make an appropriate award based upon that determination." *James Filbrun v. Illinois Workers' Compensation Comm'n,* 2019 IL App (4th) 1080242 WC-U, P83.

In accordance with the appellate court's direction, The Commission has considered the pertinent parts of the record *de novo.*

The Commission finds that Respondent should not be liable for medical expenses incurred after July 31, 2013. This determination is based upon the opinions rendered by Dr. Hurford in her note of that date stating that while Petitioner was in need of further pain management treatment, that it was not related to his work accident of April 25, 2011.It is significant to note that Petitioner suffered from a significant developmental spine deformity

which generated pain. Dr. Hurford's note reflects that Petitioner would have inevitably required pain management secondary to his deformity of the thoracic spine. Dr. Hurford found Petitioner to be at MMI as to pain management as of July 31, 2013.

The appellate court found that the Commission erred in denying Petitioner recovery for medical expenses incurred after June 12, 2012, merely because he had achieved MMI on that date. The appellate court ruled that medical expenses to help alleviate pain from a condition causally related to Petitioner's employment incurred after he has reached MMI are compensable relying upon, *Elmhurst Memorial Hospital v. Industrial Comm'n* 323 Ill. App.3d 758,756 (2001).

The Appellate Court affirmed the Commission's finding that the opinions of Dr. Hurford were more persuasive and reliable than those of Dr. Florence. Therefore, the adoption of the opinions of Dr. Hurford are now final and mandatory.

Respondent has agreed to pay the following medical bills incurred after June 12, 2012;

1) February 19, 2013- $205.00 (Fee Schedule amount $90.07 based upon CPT code of 99214)
2) May 24, 2013- $139.00 (Fee Schedule amount $59.85 based upon CPT code of 99213).

Petitioner contends that there are 12 office visits to Dr. Florence, petitioner's PCP that addressed pain management issues. (PX2) The charges for these medical visits total $2003.00, which are unpaid by respondent.

Petitioner further contends that PX10 contains the bills of Dr. Florence for the afore mentioned visits. RX2 consists of payments made by respondent and that a comparison of the two exhibits supports the petitioner's assertion that respondent should pay $2,003.00 in outstanding medical related to the work accident after June 12, 2012.

Additionally, petitioner seeks payment for prescription bills from HyVee Pharmacy and prescription bills from Injured Workers' Pharmacy after June 10, 2013. Petitioner seeks leave to submit additional medical expenses incurred since the trial date and into the future.

The Commission hereby awards medical expenses incurred after the MMI date of June 12, 2012, through and including July 31, 2013, for the treatment of pain related to the work accident. Any expenses incurred after July 31, 2013 are denied based upon the opinion expressed by Dr. Hurford that they are not causally connected to the work accident of April 25, 2011.

IT IS THEREFORE ORDERED BY THE COMMISSION, that the Arbitrator's decision (11 WC 036342) filed July 25,2016, is hereby reinstated, in part.

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent pay to Petitioner medical expenses incurred from June 12, 2012 through July 31, 2013 for the treatment of pain causally related to Petitioner's work-related accident of April 25, 2011 as provided in Sections 8(a) and 8.2 of the Act.

21IWCC0027

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent shall pay Petitioner temporary total disability benefits of $603.01 per week for 41 1/7 weeks, commencing April 26, 2011 through February 7, 2012 as provided in Section 8(a) of the Act. Respondent shall receive credit for benefits paid in the sum of $51,169.71.

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent pay to Petitioner permanent partial disability benefits of $542.71 per week for 37.5 weeks because the injuries sustained caused the 7.5% loss of the person as a whole as provided in Section 8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent shall pay to Petitioner compensation that has accrued from April 25, 2011 through June 12, 2012, and shall pay the remainder of the award, if any, in weekly installments.

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: JAN 2 1 2021
o- 10/20/20
SM/msb

Stephen J. Mathis
Stephen Mathis

L. Elizabeth Coppoletti
L. Elizabeth Coppoletti

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on October 20, 2020 before a three-member panel of the Commission including members Stephen J. Mathis, L. Elizabeth Coppoletti and Douglas D. McCarthy, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of Douglas D. McCarthy, a majority of 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 prior to Commissioner McCarthy's departure.

21IWCC0027

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 majority 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 137, 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

FILBURN, JANSON
Employee/Petitioner

Case# **11WC036342**

SANGAMON COUNTY SHERIFF
Employer/Respondent

21IWCC0027

On 7/25/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.43% 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:

5757 MARTIN J HAXEL PC
2651 S FIFTH ST
SPRINGFIELD, IL 62703

0507 RUSIN & MACIOROWSKI LTD
R MARK COSIMINI
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821-7047

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

21IWCC0027

Case # 11 WC 036342

JASON FILBRUN,
Employee/Petitioner

v.

Consolidated cases: N/A

SANGAMON COUNTY SHERIFF,
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 Nancy Lindsay, Arbitrator of the Commission, in the city of Springfield, on May 23, 2016. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to Respondent?

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

G. ☐ What were Petitioner's earnings?

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

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

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

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

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

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

N. ☐ Is Respondent due any credit?

O. ☒ Other Vocational Rehabilitation expenses

FINDINGS

On 4-25-11, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $47,035.12; the average weekly wage was $904.52.

On the date of accident, Petitioner was 33 years of age, single, with 1 child under 18.

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 $51,169.71 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $51,169.71.

ORDER

Petitioner failed to prove his current condition of ill-being is causally related to the work accident of April 25, 2011.

Respondent shall pay Petitioner temporary total disability benefits of **$603.01/week** for **41 1/7 weeks**, commencing **April 26, 2011** through **February 7, 2012** as provided in Section 8(a) of the Act. Respondent shall receive a credit for benefits paid in the amount of $51,169.71.

Respondent shall pay Petitioner permanent partial disability benefits of **$542.71/week** for **37.5 weeks** because the injuries sustained caused the **7.5% loss of the person as a whole** as provided Section 8(d)2 of the Act.

Respondent shall pay compensation that has accrued from **April 25, 2011** through **June 12, 2012** and shall pay the remainder of the award, if any, in weekly installments.

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

Nancy Lindsay
Signature of arbitrator

July 19, 2016
Date

JUL 25 2016

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

Petitioner has been employed as a correctional officer for the Sangamon County Sheriff's Department since 2001.

Petitioner received chiropractic treatment with Dr. Dana Oliver, a chiropractor, on March 11 and 12, 2010. (PX 16)

Petitioner presented to Dr. Oliver on March 25, 2010 regarding neck, mid back, and headache complaints. Petitioner reported headaches off and on for years and midback pain for about a year. He described the pain as "deeply sore." He took two Darvocet the night before in order to sleep. He denied any recent trauma or injury. He had a mild auto accident in 2001 with chiropractic care thereafter. He underwent left ankle surgery in 2001 after stepping in a hole playing volleyball. He underwent left knee surgery in 2006. Petitioner displayed moderate hypertonicity with tenderness associated with the cervicothoracic musculature. He had distorted muscle tone and mobility of the ribs around T6-8. Upon questioning, Dr. Oliver noted, "he thinks he may have fractured and separated his ribs on the left about a year ago when he had a situation with a prisoner." Petitioner received care at that time. Petitioner had cervical range of motion but it was uncomfortable. Dr. Oliver's assessment was intersegmental joint dysfunction and he was provided treatment and exercises to perform at home. (PX 16)

Petitioner treated with Dr. Oliver on March 29, 2010 and received a body pillow. (PX 16)

Petitioner returned to Dr. Oliver on April 8, 2010. According to her note, "mornings [are] bad, afternoon ok, nighttime sucks." Petitioner's headaches were gone. (PX 16) Petitioner returned on April 12, 2010. Thoracic spine and left rib x-rays were taken on April 12, 2010. The impression was a fractured T9 vertebra with anterior wedging of the vertebral body. It was unclear whether the fracture was acute or subacute. (PX 16)

Dr. Oliver wrote a note to Dr. Florence on April 14, 2010 noting she had seen Petitioner for five visits and that after the third visit his neck pain and headache had resolved but he continued to experience midback pain with no improvement. Dr. Oliver referred him for diagnostic films and was sending the reports to Dr. Florence as she had advised Petitioner to follow up with her. (PX 16)

On May 5, 2010 Petitioner was examined by Dr. Joseph Williams with the chief complaint of a thoracic compression fracture. Petitioner had been referred by Dr. Florence. Petitioner gave a history of

being seen by his chiropractor as "he had pain in his back at times." He complained of a headache that had become fairly severe. He denied any recent injury. While being evaluated by the chiropractor, it was determined that he had a compression fracture at T9 and the chiropractic treatment was ended. Petitioner did recall a motor vehicle crash in the year 2000 when he was rear-ended but he had not sought any medical attention. He could not recall any other more specific injuries. Petitioner was noted to be working as a deputy for the Sheriff's Department. On physical examination, Petitioner had mild tenderness to the thoracic spine at T9. X-rays were taken and indicated a compression fracture at T9 with mild kyphosis. There was also some sclerosing of the endplates consistent with a chronic fracture. Dr. Williams' diagnosis was a T9 compression fracture and chronic neck axial pain. He ordered an MRI of Petitioner's cervical and thoracic spines as he was concerned about the fracture given Petitioner's age and lack of identifiable injury. (PX 3)

On May 13, 2010 Petitioner underwent a thoracic spine MRI as ordered by Dr. Williams. A Schmorl's node formation at T6-7 through T12-L1 was noted with anterior wedging of the T8, T 9, and T10. Given Petitioner's age, it was believed the finding might relate to sequellae of prior Scheuermann's Disease. Mild disc bulges at multiple levels with near ventral cord abutment at T8-9 was also noted. (PX 3; RX 3) Petitioner's cervical spine MRI revealed disc protrusions at C4-5 and C5-6. (PX 3)

Petitioner returned to Dr. Oliver for chiropractic treatment on July 8, 2010. According to the note, "Doesn't know anything yet – neck and low back. No new injury." (PX 16)

Petitioner returned to see Dr. Williams on July 21, 2010 with ongoing pain complaints in his thoracic region. Dr. Williams noted that Petitioner continued to complain of occasional pain consistent with intercostal radiculopathy. No acute findings were noted by the doctor and he recommended physical therapy. It appeared to the doctor that Petitioner had Scheuermann's Disease which was now symptomatic in regard to axial thoracic back pain. He was to return in six weeks. (PX 3)

Petitioner received chiropractic treatment with Dr. Oliver on July 22, 2010 (Scheuermann's is noted) and July 29, 2010 ("Back hurts.") (PX 16)

Petitioner followed up with Dr. Williams on August 24, 2010. He reported participating with chiropractic manipulations but denied any significant relief of his symptoms. Dr. Williams felt Petitioner had a questionable chronic compression fracture of T9. Petitioner was also describing some radiating pain on the left hand side. On physical examination Petitioner displayed mild tenderness to palpation of the thoracic spine. The doctor's assessment was chronic thoracic back pain with a compression fracture at T9

and Thoracic Degenerative Disc Disease. He recommended a physical therapy evaluation and a consultation with Dr. Smucker. Petitioner was to return in four weeks. (PX 3)

Petitioner returned to Dr. Oliver on September 27, 2010 who noted his "mid-back hurts a lot." He had been diagnosed with Scheuermann's. (PX 16)

On October 1, 2010 Petitioner was examined by Dr. Paul Smucker at the request of Dr. Williams due to complaints of persistent thoracolumbar pain. Petitioner gave a history of having experienced a blow to his back in March of 2010 followed by pain. He denied any prior history of similar complaints. Petitioner reported never having a day where he was fully comfortable. His pain was located midline with no radiation. An MRI showed findings consistent with Scheuermann's Disease. Petitioner was unaware of any family history of a similar problem nor had previous physical examinations with the sheriff's department or air force shown any type of spinal deformity. Petitioner reported some relief with pain pills but primarily the use of hot water. Petitioner acknowledged prior chiropractic therapy and traditional physical therapy without relief. On exam he had tenderness to palpation of the thoracic spine. Dr. Smucker reviewed Petitioner's thoracic MRI noted it revealed what appeared to be a significant compression of T9. There were no T2 changes suggestive of edema. Multi-level disc disease with thinning was evidence through most of the thoracic discs. There was some anterior angulation at T8-9 with a small disc protrusion that appeared to be abutting the ventral cord at T8-9. Dr. Smucker's impression was thoracolumbar pain and multi-level vertebral compressions which might be secondary to Scheuermann's Disease. Dr. Smucker recommended an updated MRI with "STIR images" as such images had not been included with the earlier MRI. Petitioner was to return thereafter. (RX 4)

The updated MRI was performed on October 6, 2010. It was read as showing moderate chronic wedge compression deformity ofT9 contributing to mild to moderate spinal canal stenosis. Mid to lower thoracic degenerative endplate irregularity with degenerative loss of disc height was also noted. The findings noted that there was chronic moderate wedge deformity of T9 which contributes to kyphosis and "Perhaps this represents an old fracture." There was no evidence of a recent fracture. (PX 1; PX 4; RX 5)

Petitioner did not follow up with Dr. Smucker as he had been advised to do. (PX 4)

Petitioner underwent chiropractic treatment on February 21, 23, and 28, 2011. She imposed a lifting restriction due to his low back pain and it was to remain in effect until he was re-evaluated. As of February 28, 2011, Dr. Oliver noted "Not bad at all." His work restrictions were lifted. (PX 16) As of March 3, 2011 Petitioner advised he would call Dr. Oliver. (PX 16)

On April 25, 2011, Petitioner was involved in an accident at work. Petitioner reported to the emergency room at St. John's Hospital that day. According to the emergency room records Petitioner had complaints of mid-back and right knee pain. He reported being shoved by an inmate into a steel door frame. Petitioner's mid back and right knee hit the door frame. A related history of a fracture at T8,9, and 10 was noted. X-rays taken on April 25, 2011 revealed old compression fractures at the T8, T9, and T10 levels of the thoracic spine. The x-rays did not reveal any evidence of a new compression. Some joint effusion in the suprapatellar bursa was noted on the knee x-ray. Petitioner was diagnosed with a contusion of the right knee and contusion of the thoracic spine. He was told to rest and use ice and heat to the areas of pain and to see his family doctor the next day for a recheck and release back to work. (PX 9; RX 6)

As instructed, Petitioner reported to his primary care physician, Dr. Nicole Florence, on April 26, 2011. Petitioner provided a consistent history of the work accident. Petitioner told her about his prior thoracic spine fracture and that it had healed on its own. Petitioner also complained of right knee pain associated with the altercation – primarily stiffness and decreased range of motion. Dr. Florence diagnosed Petitioner with a thoracic strain and took Petitioner off work for a week, believing he could return to work on May 3rd. (PX 2)

On May 5, 2011, Petitioner returned to Dr. Florence with complaints of knee pain and ongoing back pain. Dr. Florence referred Petitioner to Dr. Joseph Williams. He was switched to Ultam since the Tylenol with codeine wasn't helping. He was to remain off work until seen by Dr. Williams. (PX 2)

On May 11, 2011, Dr. Williams examined Petitioner. He noted significant paraspinal muscle spasms and noted "His complaints and physical findings are somewhat impressive." He diagnosed Petitioner with an acute thoracic strain as well as thoracic compression fractures and a possible new thoracic compression fracture. He ordered an MRI study which was performed May 16, 2011. (PX 3)

The MRI revealed the compression deformities which were thought to be chronic because there was no edema within the compressed vertebrae. Additionally, there was no spinal stenosis or thoracic disc herniations. (PX 3; RX 7)

Dr. Williams next prescribed medications and advised Petitioner to undergo a course of physical therapy. (PX 3)

Petitioner had his physical therapy evaluation on May 31, 2011 at Midwest Rehab. Petitioner reported increasing pain after being slammed into a door on April 25, 2011. Petitioner described problems standing, bending, and sleeping due to pain. He described feeling his best when hunched in a flexed position and often rotating to the right and leaning to the right to alleviate his symptoms. Petitioner also

reported a previous injury occurring approximately a year before that resolved with rest and medication. Petitioner expressed the desire to return to his normal job duties and have less pain although he was concerned about being able to do so given he had had his second injury in as many years. Petitioner's job was noted to be that of a corrections officer with typical duties including transporting inmates to and from court dates. He was not presently working since Respondent had no light duty. Petitioner was observed as walking guardedly with very little trunk movement when standing and walking. He also demonstrated a high degree of pain behaviors such as holding his breath with movement. Goals and exercises were discussed. (PX 7)

Petitioner underwent therapy on June 2, 2011 reporting no change. (PX 7)

Petitioner had therapy on June 6, 2011 and reported his mid back was very sore as was his low back but the former was worse. (PX 7)

Petitioner attended therapy on June 8, 2011 reporting today was a "bad day" but recalling no "offending activity." Petitioner reported relief while doing the modalities but, otherwise, ongoing pain. He had purchased a Swiss ball at home to do lower truck rotation there. (PX 7)

Petitioner continued to attend physical therapy on June 13, 2011 and June 17, 2011. (PX 7)

On June 21, 2011, Petitioner returned to Dr. Williams reporting no improvement with the physical therapy program. Dr. Williams ordered a bone scan. (PX 3)

Petitioner underwent a nuclear bone scan on July 12, 2011. It showed no abnormal radiotracer uptake associated with compression deformities within the thoracic spine. Findings included some slight thoracic kyphosis. (RX 8)

Petitioner underwent a Physical Therapy Re-evaluation at Midwest Rehab on July 22, 2011. Subjectively, Petitioner reported ongoing and constant thoracic spine pain which would shoot down into his low back. He denied any radicular complaints. Petitioner was noted to not be wearing his TENS unit and he explained that insurance had just sent him additional electrode pads so he had been using them sparingly. Petitioner felt heat helped more than ice and he had difficulty finding a comfortable position. Petitioner reported his back popped a lot and if he flexed his trunk, his back would catch. He acknowledged understanding that it would all heal with time but was "tired of hurting." Petitioner had returned to work four hours a day at a light duty level. He could not take pain medication at work and his chair was bad. He expressed the desire to return to work but didn't think he could do so with the amount of pain he had. Petitioner's Modified Oswestry Low Back Pain Disability Questionnaire score was a 66%

which indicated "crippled." Petitioner also displayed some guarding and pain behaviors such as facial grimacing and holding his breath. (PX 7)

Petitioner was taken off work as of July 22, 2011. (PX 7)

Petitioner returned to physical therapy on July 25, 2011 reporting ongoing pain and complaints. At the July 27, 2011 therapy session, Petitioner reported some tailbone pain which the therapist told him could be from moving more or the stretches. The therapist observed that Petitioner was attending therapy with an erect posture but facial grimacing. When Petitioner was questioned about standing straight, he replied, "I'm not working." (PX 7)

Petitioner cancelled his physical therapy scheduled for the first week in August due to a staph infection in his tailbone. At his August 8, 2011 therapy session he was standing up straighter and his thoracic spine, while tight, wasn't throbbing. Sleeping was still rough. (PX 7)

At his August 10, 2011 therapy session Petitioner reported feeling like someone was kicking him in the back or he was having a throbbing headache. He did not wish to perform some of the upper extremity exercises at that visit. (PX 7)

Petitioner continued with therapy. On August 15, 2011 he reported not having any pain pills and not sleeping more than 3.5 hours per day. His back felt like someone was constantly squeezing in on it. (PX 7)

Petitioner presented to therapy on August 17, 2011 reporting he was very sore. He had showered at home on August 16, 2011 and felt something catch in his back and his muscles "seized up." He lost his balance and fell on his right side. His back had been hurting ever since and was reportedly at an "8/10" level of pain. Dr. Williams' office was contacted and Petitioner was told he could stop physical therapy for a while if he thought it would help. Petitioner was going to talk to the doctor. (PX 7)

Dr. Williams re-examined Petitioner on August 19, 2011. Petitioner reported falling in the shower on August 16, 2011 and that since then, his pain had been "slightly worse." Physical therapy had been placed on hold per Petitioner. X-rays were taken with no acute findings. Dr. Williams wanted a second opinion with Dr. Keith Bridwell, especially concerning the possibility of surgery. Petitioner was given Tylenol #3 to take in the interim. He was taken off work pending the second opinion. Further recommendations were to follow. (PX 3)

Petitioner was evaluated by Dr. Buchowski on September 27, 2011, upon referral of Dr. Williams, due to his thoracic back pain. Petitioner reported that his symptoms initially began in September or

October of 2010 when he struck his back on the underside of a desk. Subsequently his symptoms were worsened when he was shoved into a steel door frame hitting his back on the door frame (April of 2011). Petitioner reported sharp, aching, moderate to severe pain in his thoracic spine since that time. He rated the pain as "6/10." His primary complaint was pain as he identified no other problems with motor tasks or upper/lower extremity issues. Petitioner had tried physical therapy, exercise, massage, TENS Unit and narcotic pain medications with minimal improvement in his symptoms. Petitioner reported being unable to work. A physical examination was performed and an MRI from October 11, 2010 was reviewed. Dr. Buchowski's impression was thoracic back pain secondary to a work-related injury in October of 2010 and subsequently in April of 2011. Dr. Buchowski recommended continued non-operative treatment in the form of an evaluation with a physiatrist to maximize all non-operative treatment. He also recommended a new MRI scan as the one he had seen was over a year old or that he be provided with the one Petitioner indicated had been done in the last six months. The doctor noted, "I believe that the patient's current symptoms are casually and directly related to his work related injury. He does appear to have Scheuermann's disease, which almost certainly predated his existing symptoms; however, I believe that the work related injury exacerbated the underlying condition." (PX 5, p. 2) Dr. Buchowski felt Petitioner could work with the following restrictions: no lifting, pushing, and pulling over 20 lbs.; no bending/ no twisting; and frequent standing/walking breaks. The doctor further indicated that Petitioner should be allowed to take pain medication as needed for pain relief. He acknowledged the restrictions could make working for Respondent difficult. The doctor expressed optimism at getting Petitioner back to his normal state of being without resorting to surgery. He wished to see him again. (PX 5)

Petitioner was under video surveillance on September 30, 2011. He was photographed walking in and out of a door onto a porch where he would stand, walk, and lean on the porch railing. He was smoking cigarettes and talking on a phone. (RX 16)

Petitioner returned to see Dr. Smucker on October 14, 2011, approximately one year after his first visit wherein Dr. Smucker had treated him for injuries sustained the previous March. At that time, Dr. Smucker diagnosed Petitioner with Scheuermann's Disease with an exacerbation of pain related to his work accident. Dr. Williams had subsequently referred him to Dr. Buchowski at Washington University who had recommended that he be re-evaluated by a physiatrist. Hence, the appointment with Dr. Smucker. Petitioner related being very fit in the past and working as a correctional officer. He expressed frustration by his persistent thoracic pain as he was unable to exercise in any meaningful way and had gained 35 pounds. He had tried working in a light duty position but was failing at that because there was no way for him to lie down. Petitioner reported being unable to stand up straight at any time and related that his back felt like there was a slab of concrete on each side of midline and a pounding aching pain in

the midline amplified with any significant activity. Petitioner was taking six Tylenol #3 per day which didn't really help with the pain and made him feel fuzzy. Dr. Smucker's physical exam and diagnosis remained unchanged from the 2010 visit. He had no further recommendations for care. Physical therapy had not helped. He did not think Petitioner was going to improve with anything that he had at his disposal. If there was a chance surgery could help, Dr. Smucker felt it should be explored. Dr. Smucker took Petitioner off work as he couldn't even do light duty work. He was prescribed different medication. Dr. Smucker also noted that the compression fractures were felt to be chronic in nature. (PX 2; PX 4)

At the request of Respondent, Petitioner was evaluated by Dr. Patricia Hurford on November 8, 2011. Petitioner provided Dr. Hurford with a history of his accidents – both in 2010 and 2011. Petitioner told her that after the March 2010 injury he was able to resume his prior activities but to a lesser extent. He was unable to play softball and required more frequent breaks. He was only able to run up to three miles per day versus the five miles he had run before the March 2010 accident. Petitioner described "significant difficulty dealing with pain" since his April 25th injury. He described constant pain and the need to use Tylenol #3 every four hours along with Nabumetone. Petitioner mentioned cold and damp weather aggravated his pain and he didn't believe he could return to full duty work. The day of his visit with Dr. Hurford he stated he was primarily sedentary or bedridden due to significant pain complaints. On physical exam Petitioner was noted to have an increased thoracic kyphosis with painful extension. Dr. Hurford noted there were no acute deformities identified on Petitioner's diagnostic studies; however, moderate thoracic kyphosis and compression deformity at T8 – was noted with disc space narrowing particularly between the T9 – T10 vertebral bodies. She did not render any opinions at that time due to the lack of Petitioner's pre-accident medical records; however, she recommended he stop smoking and decrease his reliance on bedrest and narcotic analgesics. (RX 10)

After reviewing Petitioner's medical records, Dr. Hurford prepared an addendum report dated November 21, 2011. (RX 11) After describing Petitioner's medical treatment, Dr. Hurford commented that assuming Petitioner's history was accurate and he was pain-free and active as of April 25, 2011 and did not require pain medications or other treatment for his thoracic spine, it would be reasonable to assume that the altercation did result in an exacerbation of pain symptoms. She made it clear the underlying condition of the spine was not produced by the events which occurred April 25, 2011.

Dr. Hurford also commented that Petitioner has significant dysfunction and pain-coping abilities. She felt Petitioner was treating himself with excessive inactivity due to his reported intolerance of most activities of daily living. Dr. Hurford concluded Petitioner's inactivity would lead to more chronic and severe pain complaints due to a combination of deconditioning and limited distraction techniques.

Additionally, she felt Petitioner was aggravating his condition with excessive tobacco use and pain medications. Dr. Hurford recommended that Petitioner exhaust all conservative measures, including injections, bracing and modified activities to improve his symptoms. She felt her review of Petitioner's entire records suggested a pattern of pain and dysfunction that was developing in 2010 and extending into his recent injury and subsequent treatment. Cognitive behavioral techniques and work with a physician that he could trust and respect would likely result in the maximum benefit to Petitioner. She felt Petitioner had done very little to help his current situation and approached any thought of increased activity with skepticism due to perceived pain results. (RX 11)

On December 13, 2011 at the request of the Work Comp Case Manager, Petitioner was examined by Dr. Salvacion at the Spineworks Pain Center. Petitioner gave a history of a work-related injury going back to May of 2010 when he hit his back on a desk. Then, on April 27, 2011 while scuffling with an inmate he was "slammed" in to a steel door frame on his back with continued pain and spasming thereafter. Petitioner's treatment with Dr. Williams and Dr. Buchowski was noted with Petitioner having been sent to Dr. Smucker for epidural steroid injections which Dr. Smucker was unwilling to consider. Therapy had provided only limited benefit. Petitioner described his pain as a constant aching with spasms, as though being kicked in the middle of his back. Nothing helped with the pain and it worsened with activity. On physical examination Petitioner's spasms were noted as well as his tilted posture to the left which the doctor felt was due to the spasms. Very limited range of motion in the thoracic and lumbar spine secondary to pain was also evident. The doctor's impression was thoracic compression fractures, myofascial pain, and thoracic degenerative disc disease. Petitioner was to be scheduled for a trial of thoracic epidural steroid injections and he was given a prescription for baclofen and tramadol. Petitioner was taken off work for thirty days. (PX 6)

Petitioner returned to Dr. Florence on December 14, 2011, having last seen her on May 5, 2011. Petitioner was there for a routine clinic follow-up but requesting pain medication. Petitioner reported originally getting hurt at work in April and being seen by Dr. Williams and, more recently, a thoracic surgeon who felt surgery should wait until Petitioner was older. That doctor had referred him to Dr. Smucker who didn't want to do further injections. Petitioner had just seen Dr. Salvacion who was going to be giving him an injection. Petitioner advised the doctor he was able to do activities of daily living, with limitation, but unable to work. Her assessment was chronic pain due to trauma and a closed fracture of the thoracic vertebra with spinal cord injury. Petitioner was given a Fentanyl patch. (PX 2)

On January 17, 2012 Dr. Salvacion performed a thoracic epidural steroid injection on Petitioner. (PX 6)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DUSTIN STONE,

Petitioner,

vs. NO: 08 WC 51795

CENTRAL ILLINOIS TRUSS,

Respondent.

21IWCC0028

DECISION AND OPINION ON REMAND

This matter comes before the Illinois Workers' Compensation Commission pursuant to a remand from the Tazewell County Circuit Court, case number 19-MR-140 entered January 10, 2020. On May 29, 2018, Arbitrator Michael Nowak issued a Decision in case number 08 WC 51795, finding that the Petitioner sustained accidental injuries arising out of and in the course of his employment on November 10, 2008, wherein he sustained an injury to his left leg requiring an above the knee amputation. The Arbitrator awarded reasonable and necessary medical services, prospective medical and permanent partial disability benefits of $206.67 per week for 125 weeks, because the injuries sustained caused 25% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act, in addition to the permanency paid under §8(e) for the statutory loss previously paid by Respondent for the amputation injury.

Petitioner timely filed a Petition for Review of the Arbitrator's Decision, raising issues of medical expenses, prospective medical, and permanent disability. In his brief, Petitioner raised the issue of penalties, although the Commission notes that the record was devoid of a penalties petition and Petitioner's argument was based on a tort theory for causing the Petitioner's injuries. (ArbX1) On March 5, 2019, oral arguments were heard in the matter, with both parties represented by counsel. On April 24, 2019, the Commission, after considering the issues raised by Petitioner,

and being advised of the facts and law, affirmed and adopted the May 29, 2018, Arbitrator's Decision in its entirety and clarifying that 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.

Petitioner sought judicial review in the Circuit Court of Tazewell County. On January 10, 2020, Judge Stephen A. Kouri, Circuit Judge of the Tenth Judicial Circuit Court, issued the remand ordering the Commission to re-consider the finding that Petitioner is not permanently and totally disabled as a result of his work-related accident. The April 24, 2019, Decision and Opinion of the Commission that had adopted the decision of the Arbitrator in its entirety, included two paragraphs that referred to Petitioner's purchase of seven homes in the central Illinois area and that the Petitioner and his wife established a management company for the seven properties owned by the Petitioner. The Arbitrator noted that "the Petitioner has resumed employment as a landlord or property manager/investor." In the circuit court's judgement, there was not enough evidence in the record to support a finding that Petitioner "engaged in any activity, physical or otherwise, in connection with the rental houses that he purchased, other than perhaps collecting rent checks. In fact, Petitioner on cross-examination stated that a number of family members assist him 'a lot.'"

The circuit court found that the property management business "was not a proper factor to consider in determining whether Petitioner is permanently and totally disabled." The court vacated the decision of the Commission solely on this issue and remanded the case to the Commission for reconsideration and determination as to whether Petitioner is permanently and totally disabled without using the rental property and property management company as a consideration.

In accordance with the Remand Order, after considering the entire record, and being advised of the facts and law, the Commission affirms the Arbitrator's Decision concluding that the Petitioner has not sustained his burden of proving that he is permanently and totally disabled based upon the following:

Permanent Disability

The courts have provided the framework for analysis of the ways an injured worker establishes that he is permanently and totally disabled as follows:

> An employee is permanently and totally disabled if he or she is obviously unemployable, *i.e.*, unable to make some contribution to industry sufficient to justify the payment of wages or there is medical evidence to establish a claim of permanent and total disability. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 53, 390 Ill. Dec. 293, 28 N.E.3d 946; *Lanter Courier v. Industrial Comm'n*, 282 Ill. App. 3d 1, 10, 668 N.E.2d 28, 217 Ill. Dec. 843 (1996) (Rarick, J., concurring in part and dissenting in part). However, an employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286-87, 447 N.E.2d 842, 69 Ill. Dec. 407 (1983). If an employee's disability is limited and it is not

> obvious that the employee is unemployable, the employee may nevertheless demonstrate an entitlement to PTD by proving he or she fits within the "odd lot" category. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 310 Ill. Dec. 18 (2007). The odd-lot category consists of employees [***38] who, "though not altogether incapacitated for work, [are] so handicapped that [they] will not be employed regularly in any well-known branch of the labor market." *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill. 2d 538, 547, 419 N.E.2d 1159, 50 Ill. Dec. 710 (1981) (citing 2 Arthur Larson *et al.*, Workmen's Compensation § 57.51, at 10-164.24 (1980)). An employee generally fulfills the burden of establishing that he or she falls into the odd-lot category in one of two ways: (1) by showing a diligent but unsuccessful search for employment or (2) by demonstrating that because of age, training, education, experience, and condition, there are no available jobs for a person in his or her circumstance. *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 100783WC, ¶ 34, 966 N.E.2d 40, 358 Ill. Dec. 855; *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534-35, 668 N.E.2d 21, 217 Ill. Dec. 836 (1996). If an employee makes this showing, the burden shifts to the employer to show that some kind of suitable work is available to the employee. *Westin Hotel*, 372 Ill. App. 3d at 544.

Pisano v. Ill. Workers' Comp. Comm'n, 2018 IL App (1st) 172712WC, P73, 123 N.E.3d 409, 426, 2018 Ill. App. LEXIS 972, *36-38, 428 Ill. Dec. 680, 697

Petitioner was 19 years old at the time of the injury and worked as a Truss Assembler earning $327.33 according to the trial stipulation, which equates to $8.18 per hour for a 40 hour work week. According to the Petitioner's wage statement, he was earning $9.00 per hour at the time of the accident. (RX4) Petitioner told the vocational rehabilitation counselor that he was earning $11.50 per hour. (RX2) The Respondent timely paid the statutory permanency for the amputation for loss of use of a left leg at a rate of $456.28, 50% of the statewide average weekly wage rate per the strictures in §8(b)4.1 and §8(e) of the Act. (RX3)

The record is devoid of an opinion from a medical professional that the Petitioner is permanently and totally disabled. Petitioner is not obviously unemployable nor does he make that argument. Thus, in order to prove that he is permanently and totally disabled, he must fit within the "odd-lot" category.

At the time of the arbitration hearing, the Petitioner was not working. On the trial stipulations, Petitioner listed the claimed temporary total disability (TTD) period as November 11, 2008 through March 15, 2010, and Respondent agreed. It appears that Respondent paid the TTD period in full. Petitioner did not claim that any period of maintenance was due or disputed on the trial stipulations. (ArbX1)

Petitioner further testified that the Respondent did not offer rehabilitation, provide job search assistance or retraining. Petitioner testified that instead he conducted an independent job search. (T, 21) Petitioner testified that he applied pretty much everywhere he possibly could, at factories until he realized he was not getting calls back from factories. Petitioner testified that he applied for employment at more than 25 establishments. (T, 21-22) The Commission notes that these factories and/or establishments were not identified, nor was the time frame that Petitioner applied, and no information regarding how, when, or where he applied was asked. At the time of hearing, almost nine years had elapsed since the date of accident, two years since Petitioner had medical treatment for his leg or back complaints, and a little more than one year since he even saw his family practitioner, at which time no medications were prescribed. (T, 39) Petitioner testified that he was going to school at the time of the arbitration hearing hoping to attain a business degree. (T, 28)

On cross-examination, Petitioner testified that for the most part he tended to his own landscaping and general maintenance for the home he owned and lived in. (T, 32) Petitioner also testified that at some point in time, his physician released him to return to work with some work restrictions and subsequently that he was hired by Gil's restaurant in June 2011, then at Hardee's in 2013. (T, 36)

Petitioner further testified on cross-examination that in the two years prior to the Arbitration hearing, he put in at least 12 applications for employment. Two of them he applied online and the rest he went into the actual business and applied; however, he did not bring any evidence of a job search to the hearing, and again, did not identify the purported employers, businesses, or the locations of same, person or persons contacted, or dates that he applied. (T, 38-39)

As the Arbitrator noted, the only medical evidence offered regarding Petitioner's work status is the February 17, 2010, §12 opinion report authored by Dr. Virkus, offered by Respondent, which relied heavily on the work conditioning discharge report in formulating an opinion regarding Petitioner's permanent restrictions.

Based on the work conditioning discharge summary, Dr. Virkus opined Petitioner's lifting and carrying should be limited to 75 pounds which Petitioner advised Dr. Virkus that he could do. Although Petitioner was cleared to go on ladders, based on the prosthesis, Dr. Virkus thought short step ladders would be fine but that Petitioner should avoid working on ladders at heights at about 10 or 15 feet. Dr. Virkus opined that Petitioner was at maximum medical improvement and that he could return to work full-duty. (RX1) It appears, therefore, that Respondent terminated TTD based on this report, since TTD was terminated on March 15, 2010.

Petitioner testified that Respondent did not offer Petitioner his position. However, when asked if he went back to the Respondent to inquire if they would employ him, Petitioner testified that he would "see Todd Irwin at Casey's in Deer Creek after they would get off the first shift" and "talk occasionally" and he would ask if they were hiring or would be willing to hire him back.

(T, 24) Petitioner never identified Todd Irwin's position and did not establish what, if any, authority or even amount of knowledge that Irwin had regarding Respondent's open positions or hiring potential. Petitioner never testified that outside of casual inquiries that he contacted the Respondent, either management or through human resources.

Dr. Virkus released Petitioner to return to work full-duty with certain restrictions that appear to be commensurate with his former position, although Petitioner maintains that he is entitled to a §8(f) award under an odd-lot theory. To be entitled to a §8(f) award under an odd-lot theory, Petitioner must show either (1) a diligent but unsuccessful search for employment or (2) by demonstrating that because of age, training, education, experience, and condition, that there are no available jobs for a person in his or her circumstance. (citations omitted) If Petitioner made this showing, the burden shifts to Respondent to show that the claimant is employable in a stable labor market and that such a market exists. *Westin Hotel*, 372 Ill. App. 3d at 544, 865 N.E.2d at 357.

1) Petitioner's Diligent but Unsuccessful Search for Employment

Petitioner testified that he applied to more than 25 establishments, some of which were factories, and he testified that in the two years before the hearing, that he applied for only two jobs online and filled out ten in-person applications. The Commission finds that applications to 25+ establishments in the three or four years between 2010 and 2013 or 2014, and 12 applications in the last two years before the hearing, 2015 and 2016, does not constitute a good faith or diligent job search, especially with no corroborating details regarding the names of the establishments or the specifics of these applications and/or follow-up. Petitioner brought no evidence of a job search to the hearing. Further, he testified that over the course of seven years since his work conditioning discharge report that he obtained only two short-lived jobs at fast food restaurants in 2011 and 2013, this despite Dr. Virkus's opinion that he could return to full-duty work with restrictions and with no medical opinion to the contrary. The Commission is not persuaded by Petitioner's testimony without any corroborating evidence, that he pursued a diligent but unsuccessful search for employment.

2) Petitioner's Age, Training, Education, Experience, and Condition

Petitioner is young and has a high school diploma. An injured workers' age can be a negative factor generally when approaching advanced or retirement age and/or in cases when the workers' experience has been limited to a specific skill set or trade for all or the majority of their careers, and/or had limited education. (See *AC McCartney Farm Equip. v. Ill. Workers' Comp. Comm'n*, 2020 IL App (2d) 190720WC-U, 2020 Ill. App. Unpub. LEXIS 1744 (odd-lot awarded when Petitioner was 59 years old and high school drop-out); But see *Valley Mould & Iron Co. v. Industrial Com.*, 84 Ill. 2d 538, 419 N.E.2d 1159, 1981 Ill. LEXIS 273, 50 Ill. Dec. 710 (Ill. January 1, 1981) odd-lot award denied when the only evidence the employee presented in support of his claim of odd-lot status was his age, (45 years old) the fact that he had been working for the employer for 3 1/2 years at the time of the accident, and that he converses in Spanish rather than English; *A.M.T.C. of Ill., Inc. v. Indus. Comm'n*, 77 Ill. 2d 482, 397 N.E.2d 804, 1979 Ill. LEXIS

403, 34 Ill. Dec. 132 (Ill. November 21, 1979) odd-lot denied when the employee presented the evidence in support of his claim: (1) he was 45 years old; (2) he worked for the employer full time for seven years prior to the injury and part-time for six years prior to becoming a full-time employee; (3) he was only educated up to the 8th grade; and (4) he performed other, unspecified work.)

In this case, Petitioner is young and other than his work-related amputation, is reportedly healthy, thus his age does not, by itself, qualify for an "odd-lot" finding. Having a high school degree is a positive factor and there is no evidence that Petitioner cannot work based on limited education. On the contrary, obtaining a high school degree shows Petitioner completed his basic education. The Commission recognizes that a post-high school education might improve Petitioner's chances of finding alternate gainful employment, however, Petitioner has shown that he had the ability to work with his hands should he choose not to pursue further education. Although he has limited training and experience, he has some work experience and shown the ability to learn a trade. Thus Petitioner's education, training and work experience do not contribute to an "odd-lot" finding.

Finally, the Commission reviews the medical evidence regarding Petitioner's condition of ill-being and his employability.

Expert testimony at the civil trial was submitted into evidence by Petitioner and established that Petitioner has and will always have two prosthetic legs for his left leg. One is a C-leg, which has a computerized controlled microchipped knee and, in the clear plastic towards the bottom or foot, there is a pipe or pylon that has force sensors in it that reads the ground reaction forces as he is walking. Petitioner could slow down, and the computer will automatically speed the damping of the prosthesis. He can walk from very slow to fairly briskly with the C-leg. This leg cannot get wet. (Px9, p. 38, 41, 83-88)

In addition, there was an agreed provision for a power knee to be provided for Petitioner and it was agreed to be a phasing-in of that knee that would allow easier walking, especially on stairs and ramps. The power knee is like the C-leg that he currently wears; it also provides a variable where he can speed up or slow down. (PX9, 31) A power knee is a better and more advanced technology than the C-leg that Petitioner was using and more advanced. It makes doing stairs easier and allows amputees to be able to learn going down stairs, step over step, because of the way the knee is designed. It also allows easier motion on inclines and the power to assist and help bring the amputee from a sitting position and up to a standing position. (PX9, 67)

The second leg Petitioner uses is a non-microprocessor controlled prosthetic device for times when the Petitioner's activities would not be suitable for the current-microprocessor controlled knee. Another advantage is that the second prosthetic is lighter. The prosthetic expert opined Petitioner needs two prosthetics for the remainder of his life and basically, since the technology is changing so fast, any improved version should also be made available to him. On a scale based on Medicare guidelines, -0- thru 4, K Level-0- being a prosthetic user that is not going

to be functional with a prosthesis, doesn't have strength or good balance, K Level 1 is where a user can be using the prosthesis for transfers and single speed ambulation with an assisted device. K Level 3 is where a user can vary their cadence and would not have to use any assistive device and K Level 4 are the ones that are out running, rock climbing, doing everything a high-end athlete may be accomplishing. Petitioner achieved K-3 at the time of trial in 2011- he could go down stairs step over step but going up was still one step at a time. (Px9, pp. 83-88, 56) He was expected to progress to K level 4 when he got his fourth generation knee. (Px9, p. 51)

Petitioner's last visit with his physiatrist before the civil trial was July 2, 2010, at which time Petitioner reported some low back pain. His physiatrist testified at the civil trial that Petitioner had goals of being very active in his lifestyle, so the microprocessor knee helps as it is designed to help him negotiate any level of activity, like going up and down a flight of stairs, or go light jogging or fast walking, he should be able to do it with that kind of knee, because it controlled the knee and the hip really well. (PX7)

At the arbitration hearing, Petitioner testified that he was going to obtain the 2017 prosthetic device that year. He noted that it was better than the C-leg he had since the year of the injury; he thought it would fit his knee more. He explained that it would be more up to date on "how he would walk." (T, 20)

Thus the Commission finds that Petitioner has not sustained his burden of proving that by virtue of his age, training, education, experience, or condition, he is entitled to an award of odd-lot permanent and total disability.

Assuming arguendo Petitioner had proven either prong of the odd-lot theory, and the burden shifted to Respondent to prove there was a stable job market, the Commission finds Respondent has proven by a preponderance of evidence a stable job market existed.

Respondent hired Monicka Dabrowiecka, a certified vocational counselor, for a vocational assessment and labor market survey. Dabrowiecka, testified on behalf of Respondent regarding an initial vocational report she authored after meeting with Petitioner on February 22, 2017. The report date was April 26, 2017. (RX2) She also created a labor market survey assuming Petitioner's restrictions. She completed a labor market survey report dated August 29, 2017. (Rx5) Dabrowiecka listed among Petitioner's transferable skills (reading) blueprints, assembly, working with hand/power tools, mechanical aptitude, ability to make judgments and decisions, manual dexterity, ability to learn in short term, on the job training and attaining precise set limits, tolerances and standards. Dabrowiecka noted that Petitioner also exhibited good communication skills. (RX2, 3-4)

Dabrowiecka testified that she creates a labor market survey by researching jobs online or by using various search engines such as Indeed.com, Career Builder, and contacting by using the Yellow Pages or computer, specifically, Google, to obtain information on job openings. She testified that she would contact employers directly by phone, and if there was a position open, she

would interview the employer and ask questions such as the duties of the position, qualifications needed, and wages, and whether the person could perform the position within his restrictions. As part of the labor market survey at bar, she contacted about 30 employers. Of the 30 contacted in this case, 16 employers responded. Those 16 potential employers or opportunities are listed in the body of the report. She concluded, based on the information provided, there is a fair labor market for Petitioner consistent with his educational level, skills and work histories. (T, 55-58)

The basis for her opinion was that 16 employers responded, 14 stated the positions identified were within Petitioner's restrictions and work skills. Based upon her research, the anticipated salary Petitioner could earn should he seek gainful employment, and reported by employers, was $10-$15 per hour, similar or more than he was earning at the time of his accident. It was still her opinion as noted in the initial report that even with his limitations, Petitioner is employable and that there's suitable employment available for him. (T, 58-59)

The Commission notes that Petitioner has a high school diploma and according to Dabrowiecka's interview and report, his hobbies include woodworking and doing light repair/maintenance on his three automobiles. In addition, he reported that his balancing and driving was fine. Petitioner reported to the vocational counselor that he went to one semester of classes at Illinois Central College, and he has a computer at home but his skills "are limited to browsing the internet, send/receiving emails" but he "hunts & pecks" when typing.

Since the accident, Petitioner reported he worked full-time as a fryer/cook at Gill's Restaurant from June 2011 to August 2011 and left the position due to safety issues. He also worked as a cook at Hardees on a part-time basis, 16-20 hours per week from October 2013 to December 2013. (RX2, 3-4) He told Dabrowiecka that the floors were slippery and he was not allowed to sit or rest when needed. (RX2, 4)

Based upon the medical records available and reviewed by Dabrowiecka, and after checking the Census Wage Data for Peoria, IL Metropolitan Statistical Area (Truss Assembler DOT #762.684-062) which was listed in the Medium Physical Demand Level, it was Dabrowiecka's opinion that Petitioner is capable of performing his previous work. (RX2, 4)

Dabrowiecka and Dr. Virkus opined that Petitioner could return to his pre-employment position. The Commission finds Dr. Virkus credible and Dabrowiecka's vocational report and testimony credible. The Commission finds that Petitioner presented little or almost no evidence to the contrary, i.e., that he could not be employed in his previous line of work or regularly in any well-known branch of the labor market. Further, Petitioner provided no opinion from a certified vocational rehabilitation counselor that no stable labor market existed for a person with his restrictions. Moreover, two failed attempts at fast food service did not establish that no stable labor market existed for a person with his restrictions. As the court noted in *Westin Hotel v. Industrial Comm'n*:

> Indeed, the most recent cases making an odd lot determination on the basis that there is no stable job market for a person of the claimant's age, skills, training, and work history have required evidence from a rehabilitation services provider or a vocational counselor. See *Reliance Elevator Co. v. Industrial Comm'n,* 309 Ill. App. 3d 987, 992, 723 N.E.2d 326, 243 Ill. Dec. 294 (1999); *Contour Designs, Inc. v. Industrial Comm'n,* 255 Ill. App. 3d 816, 821, 627 N.E.2d 717, 194 Ill. Dec. 380 (1994); *City of Green Rock v. Industrial Comm'n,* 255 Ill. App. 3d 895, 901, 625 N.E.2d 1110, 192 Ill. Dec. 955 (1993); [***40] *Illinois-Iowa Blacktop v. Industrial Comm'n,* 180 Ill. App. 3d 885, 889, 536 N.E.2d 1008, 129 Ill. Dec. 958 (1989); but see *Boyd v. Industrial Comm'n,* 127 Ill. App. 3d 1023, 1029-30, 469 N.E.2d 1115, 83 Ill. Dec. 181 (1984) (relying, among other things, on testimony of union president, but giving no indication of reliance on expert vocational testimony).

Westin Hotel v. Indus. Comm'n, 372 Ill. App. 3d 527, 865 N.E.2d 342, 2007 Ill. App. LEXIS 296, 310 Ill. Dec. 18

Petitioner is young and has a high school degree thus his age and education bode in his favor to be able to obtain a job in the fields described by the vocational consultant. Other positions discussed at the vocational meeting, wherein Petitioner expressed interest in working in a furniture store or customer service, might be viable, however, Petitioner did not testify that he applied for work in any of those interest areas. (T, 52) Although Petitioner has limited work experience, his prognosis for activity with his prosthetics are good, thus Petitioner failed to prove he could not be employed regularly in any well-known branch of the labor market. Therefore, the Commission finds that the Petitioner did not show a diligent but unsuccessful search for employment or that by virtue of his age, education, training or condition he is entitled to an award under §8(f), an odd-lot permanent total disability award.

Petitioner presented no evidence regarding an entitlement to a wage-differential under §8(d)1 therefore, the Commission finds that Petitioner is entitled to an award under §8(d)2 compensating Petitioner for his low back pain and job change in addition to his statutory amputation, an award for which there is Commission precedent. (98 IIC 1117; 97 IIC 2030)

Based upon the above evidence, the Commission affirms the Arbitrator's finding that Petitioner failed to prove that he is permanently and totally disabled, and affirms and adopts the Arbitrator's Decision subject to modifications herein, and noting that 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 29, 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 $206.67 per week for a period of 125 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 25% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services in the amount of $12,435.69 as set forth in Petitioner's exhibit 12, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall also authorize and pay for prospective medical care including but not limited to treatment as it relates to the left lower extremity amputation, other related complications such as back pain, and replacement/maintenance of the prosthesis, as provided in Sections 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 $38,400.00. 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: JAN 22 2021
KAD/bsd
O112420
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

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

LORRAINE HERNANDEZ,

Petitioner,

vs. NO: 10 WC 02706

CITY OF CHICAGO,

Respondent.

21IWCC0029

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 9, 2018, is hereby affirmed and adopted.

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

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

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.

21IWCC0029

DATED: JAN 2 2 2021
KAD/bsd
O112420
42

Kathryn A. Doerries

Thomas J. Tyrrell

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HERNANDEZ, LORRAINE
Employee/Petitioner

Case# **10WC002706**

CITY OF CHICAGO
Employer/Respondent

21IWCC0029

On 10/9/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.33% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & EVANS
JAY JOHNSON
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0113 CITY OF CHICAGO LAW DEPT
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lorraine Hernandez
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # **10** WC **02706**

21IWCC0029

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 **April 30, 2018 and proofs were closed on September 24, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] 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 **December 16, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**36,907.00**; the average weekly wage was $**709.75**.

On the date of accident, Petitioner was **58** 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 $**51,437.61** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**51,437.61**.

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

ORDER

Respondent shall pay Petitioner $473.17 per week for a period of 112 5/7 weeks, that being the period of time that Petitioner was temporarily totally disabled as a result of her work injury. Respondent is entitled to a TTD credit of 108 5/7 weeks for the TTD payments it already issued.

Respondent shall pay Petitioner, subject to the fee schedule and any credit, $12,693.21, for reasonable and necessary medical treatment outlined in Px 5.

Respondent shall pay Petitioner $425.85 per week under Section 8(d)(2) for a period of 50 weeks, because the injury Petitioner sustained caused a 10% loss of the person.

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

October 9, 2018
Date

OCT 9 - 2018

LORRAINE HERNANDEZ v. CITY OF CHICAGO **10 WC 02706**

I. STATEMENT OF FACTS

Petitioner has worked for the City of Chicago as a parking aid enforcement officer for twenty years. She was working in that capacity on December 16, 2009. That day, she started her route with her partner on Lake Street and Concordia Place. As she was walking her normal route with her partner, she slipped and fell on an icy sidewalk that was unlevel due to ongoing construction. She fell on her back. She felt immediate pain in her back, neck, and shoulders. She immediately called her supervisor to report the accident. Her partner helped her to her feet.

Petitioner received medical care at Mercyworks later that day. The doctor at Mercyworks noted Petitioner's history of falling earlier that day, noted her right shoulder pain, right buttocks pain, and recommended a course of physical therapy. (Px 1). The doctor placed her on a light duty work restriction. The City did not accommodate.

Petitioner testified that she followed the treatment recommendations. She was not feeling better. Consequently, she chose to treat with her physician, Dr. Morgenstern.

Petitioner first saw Dr. Morgenstern on December 29, 2009. He noted her accident history, ongoing right shoulder, neck, and back pain. He diagnosed a cervical strain and suspected rotator cuff tear and a lumbosacral disc injury.

(Px 3). He recommended physical therapy and removed Petitioner from work. Petitioner testified that she did the therapy as instructed.

Petitioner followed up with Dr. Morgenstern on January 28, 2010. He noted Petitioner's continuing neck pain, low back pain, and decreased right shoulder range of motion. He recommended an MRI to all three body parts and placed Petitioner on sedentary work restrictions.

Petitioner underwent a cervical MRI on January 30, 2010. That revealed C5-C6 and C6-C7 disc herniations. She underwent a lumbar MRI on February 2, 2010. That revealed an L4-L5 herniation. She also underwent a right shoulder MRI on February 2, 2010. That revealed tendinosis. (Px 3).

Petitioner followed up with Dr. Morgenstern after the MRIs on February 12, 2010. He agreed with the radiologist's diagnosis. He recommended trigger point injections. (Px 3). He performed these on February 17, 2010. (Px 3).

On February 22, 2010, Petitioner saw Dr. Theodore Fisher at Mercyworks' request. He reviewed Petitioner's history of accident and her prior medical records including the MRIs. He diagnosed C5-C6, C6-C7 herniated discs with radiculopathy and an L4-L5 herniated disc. He opined Petitioner was a candidate for cervical epidural steroid injections. He agreed with the sedentary work restrictions. (Px 2).

Following the visit with Dr. Fisher, Petitioner returned to Dr. Morgenstern. He referred her to Dr. Malek. Petitioner first saw Dr. Malek on April 1, 2010. He

noted her history of accident, treatment to date, and recommended additional therapy, cervical epidural steroid injections, and lumbar injections.

Petitioner underwent a series of three lumbar epidural injections between April 14, 2010 and June 14, 2010. Dr. Morgenstern performed these injections. (Px 3). Dr. Morgenstern's records note that Petitioner had mild improvement. He recommended an EMG. (Px 3).

Petitioner also underwent cervical epidural steroid injections. Dr. Malek performed those injections on May 26, 2010 and July 15, 2010. (Px 4). He noted little improvement with these injections.

Petitioner had the EMG that Dr. Morgenstern had recommended on July 2, 2010. It revealed bilateral L4-S1 radiculopathy. (Px 3). Petitioner continued to follow up with both Dr. Morgenstern and Dr. Malek throughout the summer of 2010. Petitioner's symptoms continued. On October 4, 2010, Dr. Morgenstern felt that Petitioner was developing adhesive capsulitis in her right shoulder. However, he deferred treatment on the shoulder to focus attention on her continued neck and low back problems. (Px 3). Dr. Malek recommended a new MRI. (Px 4). Petitioner ultimately had the new MRI on November 2, 2010. This revealed an L2-L3 disc herniation. Dr. Malek recommended a diskogram. (Px 4). Petitioner testified Respondent did not authorize the diskogram.

Petitioner followed up with Dr. Morgenstern for her right shoulder on January 20, 2011. He recommended a subacromial injection. He performed that injection on January 24, 2011. Dr. Morgenstern noted that the injection offered no relief. (Px 4). He recommended a topical transdermal compound for pain.

Petitioner did continue to see Dr. Malek into early 2011. He continued to recommend a cervical diskogram. Petitioner testified Respondent did not approve it.

Respondent scheduled Petitioner for a Section 12 evaluation with Dr. Carl Graf on June 3, 2011. Dr. Graf noted Petitioner's history of accident and her treatment to date. He opined that she was at MMI regarding her cervical and lumbar spine. He opined that she needed additional right shoulder evaluations. He felt she could return to work light duty and recommended an FCE. (Rx 3).

After the IME, Petitioner continued to follow up with Drs. Morgenstern and Malek. They continued to recommend the diskogram and additional shoulder evaluations. (Px 3, Px 4). Respondent sent Petitioner for a Section 12 evaluation on her right shoulder to Dr. Nikhil Verma on November 7, 2011. He opined that Petitioner did not need any additional treatment to her right shoulder. He suspected that Petitioner's pain complaints were focused on her cervical spine. He diagnosed axial neck pain. He opined her right shoulder treatment to date had been reasonable and necessary. (Rx 2).

Petitioner underwent the FCE recommended by Dr. Graf and Dr. Morgenstern on November 14, 2011. It came back as invalid. (Rx 4).

Following the FCE, Dr. Malek and Dr. Morgenstern both continued to recommend treatment to the cervical spine and shoulder. Both ultimately agreed that a trial return to work with restrictions was appropriate. Petitioner presented return to work paperwork to her supervisor, Mr. Rentas on January

16, 2012. The City did not clear Petitioner to return to work until February 14, 2012.

Petitioner testified she returned to work on February 14, 2012. She continued to have pain in her back and neck. She was limited in how much she could carry. Respondent allowed her to perform her job with the restrictions as recommended by Drs. Malek and Morgenstern.

Petitioner testified she last saw Dr. Malek on February 23, 2012. He noted that she continued to have radicular cervical pain. He again recommended a cervical diskogram. (Px 4). She testified Respondent did not approve it. Petitioner did not receive additional medical care related to this injury.

II. CONCLUSION OF LAW

The Arbitrator finds that Petitioner, a parking aid enforcement officer, did sustain an accidental injury that arose out of and in the course of her employment. Petitioner testified that on December 16, 2009, she slipped and fell on an uneven ice covered sidewalk that was under construction. This sidewalk was on Petitioner's assigned route where she normally performed her daily job activities. Petitioner had to traverse this dangerous area to perform her assigned job duties of checking all vehicles up and down the block. The Arbitrator finds that having to traverse an icy, uneven sidewalk under construction to do her job was an increased risk not faced by the general public. Consequently, her accident arose out of and in the course of her employment.

The Arbitrator also finds that Petitioner's current condition of ill-being is causally related to her work accident. There is no evidence that Petitioner had prior problems with her lumbar spine, cervical spine, or right shoulder. After her fall, she underwent medical treatment to specifically address injuries sustained to these body parts. Petitioner's treating physicians, Dr. Morgenstern and Dr. Malek, causally relate Petitioner's cervical, lumbar, and right shoulder condition to her fall throughout their medical records.

Dr. Carl Graf performed a Section 12 evaluation for Respondent regarding Petitioner's lumbar and cervical condition. When specifically addressing causation in his report (Rx 3 @ 11), he gives no specific conclusion on causation, rather he simply states he has no records regarding her cervical and lumbar spine.

With respect to Petitioner's right shoulder, Respondent's Section 12 examiner, Dr. Nikhil Verma, on opined that all Petitioner's treatment to date had been reasonable but that he could find no current ongoing right shoulder condition.

Based on opinions of Dr. Malek, Dr. Morgenstern, and Dr. Fisher, as well as a chain of events analysis, the Arbitrator finds Petitioner's current condition of ill-being with respect to her cervical and lumbar spine and right shoulder are causally related to the December 16, 2009 work accident. There is no evidence that Petitioner had had any prior injuries to any of these body parts.

The Arbitrator finds that Petitioner was temporarily totally disabled from December 17, 2009 through February 13, 2012, a period of 112 5/7 weeks. The Arbitrator notes that Respondent has paid 108 5/7 weeks of TTD benefits

from December 17, 2009 through January 16, 2012. However, Respondent did not pay Petitioner TTD benefits from January 17, 2012 through February 13, 2012, a period of 4 weeks. (Rx 1). This was the period of time that Respondent did not call Petitioner back to work after she had turned in her light duty note from her physicians. Since Respondent did not offer Petitioner light duty work within her restrictions until February 14, 2012, Petitioner is entitled to TTD benefits for that additional 4 week period.

The Arbitrator finds that Petitioner's treatment for her lumbar spine, cervical spine, and right shoulder was reasonable and necessary and causally related to the work injury. With respect to her right shoulder, Petitioner's doctors as well as Dr. Verma agreed that the treatment she received was reasonable and necessary. With regard to the lumbar and cervical spine, Petitioner received treatment, including diagnostic studies, injections, and physical therapy. Her physicians specifically treated these conditions following her work injury. Dr. Graf's opinion that he questions a "good portion" of Petitioner's treatment is given little weight. He does not specifically identify or define "good portion". Therefore, the Arbitrator orders Respondent to pay Petitioner, per the fee schedule, the charges listed in Px 5 from Advantage Imaging, Peterson Medical Surgicenter, and Dr. Morgenstern.

With respect to permanent partial disability, the Arbitrator notes that since this injury occurred prior to September 1, 2011, he does not need to consider Section 8.1(b). Petitioner testified that at the time of her return to work, she continued to have pain in her lumbar and cervical spine. She also had pain and decreased strength in her right shoulder. Her doctors have diagnosed C5-C6 and C6-C7 disc herniations. They also diagnosed L4-L5 disc herniations

and an L4-S1 radiculopathy. When she returned to work, she did so with restrictions. Her treating physicians have not removed those restrictions. Consequently, the Arbitrator finds that Petitioner has sustained a 10% loss of use of the person as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LORRAINE HERNANDEZ,

Petitioner,

vs. NO: 12 WC 38055

CITY OF CHICAGO,

Respondent.

21IWCC0030

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary disability, causal connection 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 views the evidence differently than the Arbitrator with respect to Petitioner's lumbar back condition, permanent partial disability for the Petitioner's right shoulder condition and medical expenses related to the physical therapy for the Petitioner's s right shoulder. The Commission reverses the Arbitrator's finding that Petitioner's lumbar back condition is causally related to the October 22, 2012, work accident. As a result, the Commission vacates the Arbitrator's award of temporary total disability (TTD), medical expenses, and permanent partial disability (PPD) as it relates to the Petitioner's lumbar back condition and further modifies the Arbitrator's award of permanent partial disability and medical expenses related to Petitioner's right shoulder condition based upon the following:

Lumbar Back

The Petitioner had a prior work-related accident on December 16, 2009, injuring multiple body parts and treating with Dr. Michel Malek for her lumbar spine beginning April 1, 2010. (See

companion case 10 WC 2706) Petitioner testified that the last time she saw Dr. Malek was on February 23, 2012. (T, 31)

After being released to return to work, Petitioner worked eight months until she was involved in a work-related motor vehicle accident on October 22, 2012. Immediately after the accident, Petitioner treated at MercyWorks and reported that she was being followed by an orthopedic surgeon for chronic neck and back problems. On October 26, 2012, MercyWorks records document Petitioner requested to be referred to Dr. Malek. Petitioner followed up several weeks later with Dr. Morgenstern on November 23, 2012, complaining of injury to her neck, as well as right more than left shoulder, her right knee and pain and stiffness to the lower back. Dr. Morgenstern noted her history of lumbosacral disk syndrome and radiculopathy and encouraged her to contact Dr. Malek, if she "notes increased symptoms of radiculopathy regarding her neck and lower back symptoms due to the patient's history of cervical disk and lumbosacral disk syndromes." (PX2) Petitioner then underwent extensive shoulder treatment until she had right shoulder surgery on July 25, 2013. Petitioner did not see Dr. Malek or any other lumbar spine specialist at the time. Petitioner underwent a second right shoulder surgery on March 6, 2014. She underwent physical therapy and returned to light-duty work on August 13, 2014. Petitioner continued to see Dr. Silver for her right shoulder until he released her from care on December 15, 2015, with permanent restrictions.

Petitioner had already returned to work when she opted to see Dr. David Spencer on August 29, 2015, almost three years after the motor vehicle work accident. Dr. Spencer notes Petitioner's history of injury to her back a number of years prior. A November 11, 2015, lumbar spine MRI, taken more than three years from the date of accident, showed an extruded disc at L3-L4. Dr. Spencer's November 17, 2015, history notes that Petitioner reported she recently had developed severe sciatic pain down her left leg and could not function. (PX6) Dr. Spencer performed a microdiscectomy on November 27, 2015. Dr. Spencer authorized Petitioner off-work following surgery and released her to return to work on January 12, 2016. Petitioner testified that she followed up with Dr. Spencer in April 2016, and she underwent a new lumbar spine MRI on April 13, 2016, which revealed a recurrent L3-L4 disc herniation. Petitioner testified she has not seen Dr. Spencer "since the end of 2016" however, the Commission notes that Petitioner last saw Dr. Spencer on August 31, 2016. (T, 56-57; PX12; PX7).

Thereafter, on December 20, 2016, Dr. Spencer authored a letter to Petitioner's attorney regarding his opinion on causation between Petitioner's surgery and the work accident on October 22, 2012. Dr. Spencer's causation opinion follows:

> With respect to the causation of the surgery that I performed, the MRI scan of February 2, 2010 demonstrated no disc herniation at L3-4. Therefore, any injury or accident prior to February 2, 2010, could not be related to the disc herniation that subsequently developed at L3-L4. On the other hand, the L3-4 disc herniation for which she had surgery performed on November 27, 2015, occurred at some point after the October 22, 2012, accident. Therefore, it is possible that the traffic accident of October 22, 2012, could have been a contributing factor to the development of a disc herniation at L3-4 for which she subsequently had surgery. (PX7)

The Commission finds Dr. Spencer's opinion equivocal and not persuasive.

Petitioner attended a §12 evaluation with Dr. Michael Kornblatt at Illinois Bone and Joint Institute on May 25, 2017, at Respondent's request. Dr. Kornblatt opined that the Petitioner had known lumbar degenerative disk disease and that Petitioner's then present symptomology "is causally related to the degenerative condition of her lumbar spine and unrelated to the traumatic event occurring at work in October 2012. By history, the work incident resulted in a temporary exacerbation of pre-existing lumbar disc syndrome never necessitating definitive treatment within a reasonable period of time after the work incident of October 22, 2012." (RX4B) To be thorough, Dr. Kornblatt added that he would like to comment on previous records including the operative report and MRI scan films. Any further treatment that might be appropriate would not be related to the work incident occurring October 22, 2012.

> It is axiomatic that the Commission resolves factual disputes, draws reasonable inferences and conclusions from the evidence, determines causal connection, decides which conflicting medical view to accept, and determines whether an injury aggravated a preexisting condition. Thus, the Commission decides whether to attribute a petitioner's disability to a degenerative condition or to an industrial accident's aggravation of a preexisting condition. (*Material Service Corp. v. Industrial Comm'n* (1983), 97 Ill. 2d 382, 454 N.E.2d 655.) *Illinois Power Co. v. Industrial Comm'n.*, 176 Ill. App. 3d 317, 327, 530 N.E.2d 617, 623-624, 1988 Ill. App. LEXIS 1540, *19.

The Commission finds that Dr. Kornblatt's comment regarding review of the previous records and the operative report would not be outcome determinative because his opinion turned on the fact that it was almost three years post accident before Petitioner sought medical treatment for her lumbar back, and, as Dr. Spencer noted, the herniation for which he did surgery was not identified by MRI until he saw Petitioner almost three years after the accident. Thus, the Commission finds that Dr. Kornblatt's causation opinion is more credible than Dr. Spencer's equivocal opinion and concludes that the Petitioner's lumbar spine condition, including the surgery she underwent in November 2015, is unrelated to the work accident on October 22, 2012.

Based on its conclusions regarding causation, the Commission vacates the Arbitrator's award of TTD following the lumbar spine surgery, the period between November 27, 2015, through January 11, 2016, vacates the Arbitrator's award of medical expenses related to the lumbar spine treatment that began when Petitioner sought treatment with Dr. Spencer on August 29, 2015 including, but not limited to the diagnostics, the surgery and the post-operative visits thereafter, and vacates the Arbitrator's award of permanent partial disability to the extent of 22.5% loss of use of the person under §8(d)2.

Right Shoulder

The Commission notes that the Arbitrator gave no weight to the September 26, 2013, utilization review report that addressed the necessity of the physician's prescription for 36 visits of physical therapy following shoulder surgery on July 25, 2013. The reviewing physician deemed

that the 36 visits were non-certified. The report documents that the official disability guidelines (ODG) recommend up to 24 visits for the diagnosis and there was no documentation in the physician's records to indicate the number of sessions Petitioner had participated in to date. The Commission does not wholly adopt the non-certification of 36 physical therapy sessions, however, modifies the Arbitrator's award of 36 sessions of physical therapy for the corresponding request period between September 13, 2013, and November 15, 2013, to 24 sessions per the ODG outlined in the report.

Further, the Commission views the evidence differently with respect to Section 8.1b(b) factors, (ii) through (v).

According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, 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 AMA guidelines;
(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.

In considering the degree to which Petitioner is permanently partially disabled as a result of the work-related accident, the Commission weighs the five factors in Section 8.1b(b) of the Act as follows:

(i) No AMA impairment rating was submitted by either party, so this factor is given no weight.

(ii) Petitioner was employed as a parking enforcement aide, and she had returned to work in her prior capacity. The Petitioner is now retired, thus, this factor is assigned greater weight.

(iii) Petitioner was 61 years old at the time of the accident and at the time of the Arbitration hearing, 66 years old, and retired. This factor is assigned greater weight.

(iv) There is no evidence of reduced future earning capacity in the record thus this factor is assigned no weight.

(v) Regarding evidence of disability corroborated by the treating medical records, as a result of the work-related accident of October 22, 2012, Petitioner was diagnosed with a right shoulder rotator cuff tear and underwent two surgeries. The first surgery consisted of a right rotator cuff repair with a partial anterior acromioplasty, a coracoacromial ligament transection and a distal clavicle resection. (PX4) The second surgery consisted of a rotator cuff repair and distal clavicle resections. (PX4) Petitioner underwent physical therapy at Taylor Clinic. Petitioner was released to light duty work on August 13, 2014, and Dr. Silver released her from his care on December 15, 2015, with a permanent 15 pound lifting restriction. Petitioner was off work 94-1/7 weeks,

21IWCC0030

from October 23, 2012, through August 12, 2014, at which time she returned to work as a parking enforcement aide for Respondent.

Petitioner testified at Arbitration that her right shoulder still bothers her, and that she cannot lift her arm all the way back or raise it above 45 degrees above shoulder level. Petitioner testified that she notices other limitations with her right shoulder including the fact that she cannot walk three dogs with her right arm because it bothers her, brushing her hair, using the hair dryer, and if she is sweeping or mopping she has pain for which she takes over the counter medications, including Ibuprofen, Advil and pain patches. Petitioner had last seen Dr. Silver on December 15, 2015, when he released her at MMI. Dr. Silver notes at that time Petitioner's strength is at a 4+ level with regard to forward flexion, lateral abduction and internal and external rotation. (PX5) Petitioner's exhibit 11 contains medical records closer to the date of the arbitration hearing when the Petitioner established care at Rush Primary Care on December 1, 2017. The Pain Assessment documents Petitioner reported "no" in answer to whether Petitioner reports pain. She reported "yes" to the Functional Assessment (Able to perform all ADLs). Based on the treating medical records, this factor is assigned moderate weight.

Based on the foregoing factors, the Commission reduces the Petitioner's permanency award as it relates to her right shoulder injury to 17-1/2% loss of use of person as a whole pursuant to §8(d)2.

Finally, the Commission notes a scrivener's error in the first sentence in the last paragraph, beginning on page six of the Arbitrator's Decision, wherein the sentence should read that Petitioner was temporarily totally disabled from October 23, 2012, through August 12, 2014, a period of 94-1/7 weeks.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 9, 2018, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability for the period between November 27, 2015, and January 11, 2016, a period of 6-4/7 weeks, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of medical expenses for the Petitioner's lumbar spine condition, including but not limited to the bills from The Spine Center, treatment with Dr. Spencer, the diagnostics and surgical expenses, are hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of permanent partial disability to the extent of 112.5 weeks, a 22-1/2% loss of use of the person as it relates to Petitioner's lumbar spine, is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of medical expenses for the right shoulder physical therapy outlined in Respondent's Exhibit 5, is hereby modified to an award of 24 weeks of physical therapy, vacating the award of an additional 12 weeks of physical therapy.

21IWCC0030

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to the Petitioner the sum of $524.56 per week for a period of 94-1/7 weeks, for the period commencing October 23, 2012, through August 12, 2014, that being the period of temporary total incapacity for work related to Petitioner's right shoulder condition, pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay, subject to the fee schedule and any credit, for medical expenses for reasonable and necessary medical treatment outlined in PX9, subject to the afore referenced modification of the award for the right shoulder physical therapy from 36 weeks to 24 weeks and excluding any treatment as referenced for Petitioner's lumbar spine including but not limited to the treatment with The Spine Center and Dr. Spencer, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award for permanent partial disability for Petitioner's right shoulder condition is modified and that Respondent shall pay to Petitioner the sum of $472.11 per week for a period of 87.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused a 17-1/2% loss of use of a 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.

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: JAN 2 2 2021
KAD/bsd
O112420
42

Kathryn A. Doerries

Thomas J. Tyrrell

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HERNANDEZ, LORRAINE
Employee/Petitioner

Case# **12WC038055**

CITY OF CHICAGO
Employer/Respondent

21IWCC0030

On 10/9/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.33% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & EVANS
JAY JOHNSON
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0113 CITY OF CHICAGO LAW DEPT
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lorraine Hernandez
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **12** WC **38055**

21IWCC0030

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 **April 30, 2018 and proofs were closed on September 24, 2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] 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 **October 22, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**40,916.00**; the average weekly wage was $**786.85**.

On the date of accident, Petitioner was **61** 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 $**48,262.52** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**48,262.52**.

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

ORDER

Respondent shall pay Petitioner $524.56 per week for a period of 100 5/7 weeks, that being the period of time Petitioner was temporarily totally disabled as a result of her work injury. Respondent is entitled to a TTD credit of 92 weeks for TTD payments it already issued.

Respondent shall pay Petitioner, subject to the fee schedule and any credit, $34,426.37, for the reasonable and necessary medical treatment outlined in Px 9.

Respondent shall pay Petitioner $472.11 per week under Section 8(d)(2) for a period of 212.5 weeks because the injury sustained caused a 42½% loss of the person.

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

October 9, 2018
Date

OCT 9 - 2018

LORRAINE HERNANDEZ v. CITY OF CHICAGO **12 WC 38055**

I. STATEMENT OF FACTS

Petitioner was working for Respondent as a parking aid enforcement officer on October 22, 2012. As her shift was ending, her employer directed her to wait for a coworker to pick her up in a City vehicle and take her back to the office. That coworker was Andrew Peterson.

Petitioner testified that she was returning to the office to turn in her equipment, turn in her daily paperwork, and to check out. After being picked up by Mr. Peterson and while on the way to the office, they were involved in a motor vehicle accident. Petitioner, who was sitting on the front passenger seat and was restrained at the time of the accident, flew into the dashboard. She braced herself with her right arm. She immediately noticed sharp right shoulder pain. She had difficulty moving her right arm. She also testified that her neck jerked back and forth and her back went all the way forward. She struck her right knee on the dashboard. She had pain throughout her whole body.

Petitioner testified she received emergency medical treatment at Mercyworks. (Px 1). The Mercyworks doctor diagnosed right knee, right shoulder, neck, and back sprains. He removed her from work and recommended she follow up with her doctor.

Petitioner first saw Dr. Morgenstern, her doctor, on November 13, 2012. She had seen him in the past for an earlier injury. He recommended physical therapy and removed her from work. She returned to see Dr. Morgenstern two

weeks later. Her right shoulder, cervical, and lumbar spine pain continued. He recommended a right shoulder MRI. (Px 2). Petitioner underwent the MRI on November 29, 2012. This revealed a right rotator cuff tear. (Px 2).

Petitioner followed up with Dr. Morgenstern on December 4, 2012. He injected her right shoulder. (Px 2). Petitioner got no relief from the injection. Dr. Morgenstern recommended physical therapy. Petitioner testified she began a course of physical therapy at Taylor Clinic. Petitioner testified that she had trouble doing the physical therapy because she could not move her arm. She continued to treat with Dr. Morgenstern into early 2013.

On January 30, 2013, Petitioner attended a Section 12 evaluation with Dr. Nikhil Verma. She had previously seen Dr. Verma for a Section 12 examination for a 2009 injury. He compared the earlier MRI with the current MRI and opined that the motor vehicle accident of October 22, 2012 had caused the rotator cuff tear. (Rx 2, Rx 3). He felt she was a candidate for surgery.

Following the Section 12 exam, Dr. Morgenstern referred Petitioner to Dr. Ronald Silver. Petitioner first saw Dr. Silver on March 26, 2013. He noted Petitioner's history of the motor vehicle accident, reviewed the diagnostic studies, and agreed with Dr. Verma that she would benefit from surgery. (Px 3).

While Petitioner was awaiting surgery, she did follow up with Dr. Morgenstern regarding her lumbar spine. With respect to her lumbar spine, Dr. Morgenstern noted a positive straight leg raise, recommended physical therapy, and a

Medrol Dosepak. He referred her back to Dr. Malek who she previously treated with for a spinal condition. (Px 2). She did not see Dr. Malek for this injury.

Dr. Silver performed right shoulder surgery on July 25, 2013. The surgery consisted of a right rotator cuff repair with a partial anterior acromioplasty, a coracoacromial ligament transection and a distal clavicle resection. (Px 4).

Following the surgery with Dr. Silver, Dr. Silver placed in her physical therapy. Petitioner attended physical therapy again at the Taylor Clinic. Unfortunately, her right shoulder pain continued. Consequently, Dr. Silver recommended a new MRI. That MRI took place on January 2, 2014. This showed a full thickness rotator cuff tear. Dr. Silver opined that it was a continuation of the original injury. (Px 4). He recommended a second surgery.

Dr. Silver performed the second surgery on March 6, 2014. This surgery consisted of a rotator cuff repair and a distal clavicle resection. (Px 4). He recommended additional physical therapy after the second surgery. Petitioner testified she underwent that recommended physical therapy at Taylor Clinic. She received physical therapy throughout the remainder of 2014 and into 2015. She periodically followed up with Dr. Silver throughout that timeframe. He restricted her from work. He did release her to return to work with restrictions in August 13, 2014. Petitioner returned to work on a light duty basis on August 13, 2014. Following her return to work, Petitioner did continue to see Dr. Silver. He ultimately released her from his care on December 15, 2015 with permanent restrictions of no lifting greater than 15 pounds. (Px 5). Respondent accommodated this restriction.

After Petitioner returned to work, she had an increase in her lumbar spine pain. It would radiate into her left foot. She would stumble. She decided to seek additional medical treatment.

Petitioner saw Dr. David Spencer on August 29, 2015. He noted Petitioner's history of injury to her back a number of years prior and her ongoing left-sided sciatic pain. He recommended an MRI. That MRI, done on November 11, 2015, showed an extruded disc at L3-L4. He recommended an urgent microdiscectomy. Dr. Spencer performed that surgery on January 27, 2015. (Px 6). He removed Petitioner from work following surgery.

Petitioner followed up with Dr. Spencer on December 10, 2015. He noted she was making satisfactory progress. He released her to return to work on January 12, 2016. (Px 6). Petitioner testified that she followed up with Dr. Spencer in April 2016. Her back pain had returned. He recommended a new MRI. That MRI, done on April 13, 2016, revealed a recurrent L3-L4 disc herniation. (Px 8). She last saw Dr. Spencer on August 31, 2016. He suggested another MRI and opined that Petitioner might be a candidate for surgical revision. (Px 12). Petitioner testified she has not followed up with Dr. Spencer.

Petitioner retired voluntarily from the City on March 17, 2017. She had worked under Dr. Silver's restrictions other than time she had missed following Dr. Spencer's surgery, from December 2015 until her retirement.

Petitioner testified that she remains under the care of her family doctor, Dr. Brown. She has seen Dr. Brown for her low back condition. Petitioner testified

that she fears she may need another low back surgery. She has taken no specific action to schedule any additional treatment for her low back. Dr. Brown's office notes from July 6, 2018 do document Petitioner's ongoing lumbar spine problem. There are no specific recommendations for any treatment other than pain control. (Px 11). Petitioner testified that she is afraid to have any more surgeries.

II. CONCLUSION OF LAW

The Arbitrator finds that Petitioner did sustain an accidental injury that arose out of and in the course of her employment with Respondent on October 22, 2012. On that day, she was traveling in a City owned vehicle, driven by a coworker, when they were involved in a motor vehicle accident. She was traveling back to her office to complete her daily paperwork and to check out. She was in a vehicle Respondent specifically had sent to her pick her up to bring her back to the office to complete that process. Consequently, the accident arose out of and was in the course of Petitioner's employment.

The Arbitrator finds that Petitioner's current state of ill-being in her right shoulder is causally connected to the work accident. Both Dr. Silver and Respondent's Section 12 physician, Dr. Verma, agree that the motor vehicle accident caused the right rotator cuff tear. Consequently, there is no dispute as to causation on the right shoulder.

The Arbitrator also finds that Petitioner's lumbar spine condition is causally related to the October 22, 2012 motor vehicle accident. Petitioner had lumbar back pain immediately after the motor vehicle accident. Dr. Morgenstern was

documenting her low back pain with radiculopathy and positive straight leg raises within a few weeks of the motor vehicle accident. He recommended treatment for the lumbar spine at that time. However, the primary focus of treatment back then was on her right shoulder.

Following that right shoulder treatment, Petitioner's lumbar spine pain continued. She then came under the care of Dr. Spencer. Dr. Spencer compared MRIs from February 2010 to 2015. He noted that the 2010 MRI showed no L3-L4 disc herniation. Therefore, he opined that the earlier injury from 2009 could not have caused the herniation visible on the 2015 MRI. Based on that comparison, Dr. Spencer opined that the motor vehicle accident of October 22, 2012 could have been a contributing factor of the lumbar disc herniation for which he performed surgery. (Px 7).

Dr. Michael Kornblatt performed a Section 12 evaluation on May 25, 2017. He opined that the motor vehicle accident resulted only in a temporary aggravation of preexisting lumbar spine conditions. His opinion is admittedly incomplete. He makes no reference to her lumbar surgery. In fact, he states that for thoroughness, he would like to comment on the surgical report and the MRI scans. Respondent apparently never gave him this information as Respondent only submitted one report. (Rx 4). Consequently, the Arbitrator places greater weight on Dr. Spencer's opinion as it is more complete and is based on a complete review and comparison of all relevant treatment records and diagnostic studies.

With respect to TTD, the Arbitrator finds that Petitioner was temporarily totally disabled from October 23, 2012 through August 12, 2014, a period of 94

weeks. It was during this time period that Petitioner was temporarily totally disabled following her right shoulder treatment and surgeries.

The Arbitrator also finds that Petitioner was temporarily totally disabled from November 27, 2015 through January 11, 2016, a period of 6 4/7 weeks. It was during this time period that Dr. Spencer had removed Petitioner from work following the lumbar surgery. Respondent presented no contrary evidence. Having found in Petitioner's favor on accident and causation, the Arbitrator orders Respondent to pay Petitioner TTD benefits for this time period, too.

With respect to medical, the Arbitrator finds that the treatment Petitioner received to treat the ill-effects of her work related injury are causally related to the motor vehicle accident. The Arbitrator finds that Petitioner's right shoulder surgeries, lumbar surgeries, prescription medications, and physical therapy were all reasonable and necessary to cure the ill-effects of her work injury. Consequently, the Arbitrator orders Respondent to pay Petitioner, subject to the fee schedule, for the charges contained in Px 9.

The Arbitrator notes that Rx 5, a Utilization Review report addressing physical therapy dated September 26, 2013, does not address the medical treatment contained in Rx 9. As such, the Arbitrator gives it no weight.

Pursuant to Section 8.1(b) of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. 820 ILCS 305/8.1(b) states the criteria to be considered are as follows: (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. Applying this standard to this claim,

With regard to paragraph (i) of Section 8.1(b) of the Act: Petitioner did not undergo an AMA Impairment Examination. Therefore, the Arbitrator places no weight on this factor.

With regard to paragraph (ii) of Section 8.1(b) of the Act: Petitioner is retired. Petitioner did return to work prior to her retirement. When she did return to work, she was on permanent restrictions. She worked with severe pain. The Arbitrator places moderate weight on this factor.

With regard to paragraph (iii) of Section 8.1(b) of the Act: Petitioner is 66 years old. She has several more years of life expectancy to suffer with the ongoing symptoms related to her work injury. The Arbitrator places great weight on this factor.

With regard to paragraph (iv) of Section 8.1(b) of the Act: The Petitioner is retired. Her future earning capacity is not affected. The Arbitrator places little weight on this factor.

With regard to paragraph (v) of Section 8.1(b) of the Act: With Respondent to her right shoulder, Petitioner has permanent restrictions of 15 pounds placed on her by Dr. Silver. She can only raise her arm 45 degrees. She no longer has the strength to walk her dogs. She has pain with brushing and drying her hair. She has trouble sweeping and mopping. She gets sharp right shoulder

pain when she does any of these activities. She takes over-the-counter medications as needed and utilizes over-the-counter pain patches as needed. With respect to her shoulder, the Arbitrator finds that Petitioner has sustained a 20% loss of use of the person.

With respect to her lumbar spine, Petitioner has constant radicular leg pain. She rates it at 10 out of 10. She cannot walk distances greater than 2 city blocks. She cannot comfortably sit more than 2 hours. When she stands up, she has to walk hunched over for a little bit until she can gradually straighten out. She can no longer run, jog, or attend exercise classes because of the pain. The medical records document she has a recurrent disc herniation. Her family doctor has recommended additional evaluation. Petitioner testified that she is reluctant to seek additional treatment because she is afraid to face another surgery. Based on the foregoing, the Arbitrator finds that Petitioner has sustained a 22.5% loss of use of the person as it relates to her lumbar spine.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joseph D. Roesch,

Petitioner,

21IWCC0031

vs.

NO: 18 WC 28785

Afton Chemical,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses 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 Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 28, 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: JAN 25 2021
o1/7/21
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

Marc Parker

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

21IWCC0031

ROESCH, JOSEPH D
Employee/Petitioner

Case# 18WC028785

AFTON CHEMICAL
Employer/Respondent

On 4/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0071 BONIFIELD & ROSENSTENGEL PC
JON ROSENSTENGEL
16 E MAIN ST
BELLEVILLE, IL 62220

0560 WIEDNER & McAULIFFE LTD
KHRISTOPHER S DUNARD
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

21IWCC0031

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Joseph D. Roesch
Employee/Petitioner

v.

Afton Chemical
Employer/Respondent

Case # **18** WC **28785**

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 **Mt. Vernon**, on **February 7, 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **August 23, 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 $**93,684.24**; the average weekly wage was $**1801.62**.

On the date of accident, Petitioner was **40** years of age, **married** with **2** dependent children.

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

Respondent shall be given a credit of $**54,048.60** for TTD, $**0** for TPD, $**0** for maintenance, and $**32,383.19** for other benefits, for a total credit of $**86,431.79**.

Respondent is entitled to a credit of $**93,132.88** under Section 8(j) of the Act.

ORDER

Medical benefits/Prospective medical care

Respondent shall pay for reasonable and necessary medical services, pursuant to the fee schedule and Sections 8(a) and 8.2 of the Act for lumbar fusion as proposed by Dr. Brett Taylor.

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

4-27-2020
Date

ICArbDec19(b)

APR 28 2020

Preface

The parties proceeded to hearing February 7, 2020, on a Request for Hearing and Petition for an Immediate Hearing under Section 19(b) of the Act, indicating the following disputed issues: whether Petitioner's current condition of ill-being is causally connected to an injury sustained August 23, 2018; whether Respondent is liable for unpaid medical bills; and whether Petitioner is entitled to prospective medical services. Joseph D. Roesch v. Afton Chemical, No. 18 WC 28785 Transcript of Proceedings on Arbitration at 4-5; Arbitrator's Exhibit 1.

Petitioner testified. The testimony of Dr. Brett Taylor, Dr. Donald deGrange, and Dr. Russell Cantrell were offered by evidence deposition. Roesch at 42-43; 49, 50.

Petitioner offered into evidence his Exhibit 7, records of Dr. Taylor received subsequent to his deposition. Respondent objected only to the records of February 4, 2020, on grounds of hearsay, not being certified (presumably in contravention of Section 16), and a failure to provide the records within 48 hours of trial. Petitioner offered no coherent response to the objection and did not deny providing the records untimely nor deny the failure of the records to be certified or produced pursuant to subpoena. Roesch at 44-45. A review of Dr. Taylor's testimony does not reference the record or indicate they were going to be produced, or that they had been asked for by Respondent. Petitioner failed to address the objection in his proposed finding. I sustain the objection and exclude the notes of February 4, 2020, from Petitioner's Exhibit 7.

Findings of Fact

Joseph Roesch (Petitioner), a 40 year old male, testified he worked for Alton Chemical (Respondent) as a chemical production officer. He testified that on August 23, 2018, he was working Reactor 501, a waste reactor, when wet, sandy fill began to accumulate on a conveyor belt. Working over his head, he attempted to push the material off the belt and felt a pop in his neck and back area. He said he initially had pain in his midback, shoulder, and neck. He reported the accident to his supervisor. Roesch at 10-16.

The records indicate Petitioner was seen in Respondent's medical department by a nurse, the same day complaining of injury to his neck and left shoulder. The nurse thought Petitioner strained his left shoulder and upper back, referred him to BarnesCare, and placed him on restricted duty and physical therapy for a week. The same nurse completed a First Report of Injury or Illness, failing to complete how the injury occurred or the type of injury or to indicate the specific body part affected. Respondent's Exhibit 2; Respondent's Exhibit 1.

Petitioner testified he went to BarnesCare for treatment. The records of BarnesCare are poor quality copies with confusing dates of service. Apparently, Petitioner was seen on the date of accident. The physician who treated Petitioner thought Petitioner had a sprain of ligaments of the cervical spine and parts of the left shoulder and myalgia. He prescribed OTC medication, physical therapy, and restricted Petitioner from lifting and push/pulling. An x-ray of the cervical spine showed no fracture or traumatic malalignment. An x-ray of the left shoulder showed no

fracture. Physical therapy notes of August 30, 2018, indicate Petitioner had pain in his mid-back. Essentially there is not a lot in the records to suggest BarnesCare did much of anything to cure or relieve the effects of the injury. Petitioner testified that by his last visit, the people at BarnesCare were very dismissive of him. Roesch at 16, 33; Petitioner's Exhibit 2.

Petitioner testified he began to notice problems in his lower back. He said he sought treatment at Memorial Medical and went to the emergency room. The records of Memorial Medical Group indicated Petitioner was seen September 5, 2018, by Dr. Anne Cath. He complained of pain in his back, referencing the accident of August 23, 2018. Dr. Cath thought there was an impingement on a cervical nerve. Petitioner returned to the emergency room at Memorial Hospital September 13, 2018, with left arm and neck pain. A CT scan of the cervical and lumbar spine was normal. The diagnosis was cervical and lumbar radiculopathy. Petitioner returned to the emergency room December 22, 2018, with headaches after cervical and lumbar injections. His symptoms were controlled with fluids, rest, and caffeine. Roesch at 17-18; Petitioner's Exhibit 1; Petitioner's Exhibit 3; Petitioner's Exhibit 4.

Petitioner testified he began treating with Dr. Brett Taylor. Taylor testified via evidence deposition. Dr. Taylor is an orthopedic spine surgeon. He is in private practice as an adult spine specialist. He has an undergraduate degree from Yale University and a medical degree from Harvard Medical School. He is a former chief of spine surgery, a Major in the United States Air Force Medical Corp, and a former assistant professor of orthopedic surgery. He is board certified and affiliated at four hospitals in Missouri. Roesch at 19; Petitioner's Exhibit 6 at 5-6; Exhibit 1.

Taylor testified Petitioner was referred by his family doctor, Beatriz Pardo. He first saw Petitioner September 19, 2018. Petitioner told him of the accident August 23, 2018, and pain in his neck, back, left arm, and shoulder. Taylor physically examined Petitioner and reviewed CT scans and radiographs in September 2018. Taylor said his diagnosis reached was preexisting stenosis, congenital stenosis in the cervical and lumbar spine; work exposure resulted in aggravation of disc herniation at 4-5, 5-6, 6-7 with onset of radiculopathy and hypermobility and/or instability. Petitioner's low back symptoms were consistent with lumbar instability and radiculopathy. Taylor testified these conditions were aggravated by Petitioner's workplace exposure. His preference was to treat the cervical spine first, and the lumbar secondarily. Petitioner's Exhibit 6 at 7-13.

Dr. Taylor testified he tried a conservative course at the beginning for the neck and low back, medicines, therapy, and injections. Taylor's testimony was clear, absent of jargon, sensible, and comprehensive. His answers were to the point. He was clearly competent and credible. He said nonoperative treatment was frequently unsuccessful, and Petitioner's conservative care failed. Petitioner's Exhibit 6 at 14-17.

Dr. Taylor testified he performed surgery in May 2019, a cervical fusion from C4-C7, removing C4-5, C5-6, and C6-7 discs. He found instability and disc pathology at all three levels. He said he confirmed concordant pain generators and critical stenosis at all of those levels. Dr. Taylor said Petitioner had a normal recovery period for neck surgery, as expected, and is still

temporarily disabled. It was too soon for return to work restrictions, but Petitioner is unlikely to return to heavy work. Petitioner's Exhibit 6 at 17-20.

Dr. Taylor testified he is proposing a procedure on Petitioner's low back, lumbar fusion for identified lumbar instability at L4-5 and L5-S1 due to both translation and angular change at 4-5 and the magnitude of motion at L5-S1. He said he did x-rays of bending and they are accurate. In Petitioner's case, the amount of movement was unacceptable and unstable. He proposes to fuse L4-5 and L5-S1 level, the level that had pathologic movement based on dynamic imaging. Taylor testified fusion is required because facets are involved, as opposed to a disc replacement. Dr. Taylor testified the need for surgery proposed on the lumbar area is causally connected to the accident of August 23, 2018. Petitioner's Exhibit 6 at 20-22, 25-27.

Under cross examination, Dr. Taylor testified Petitioner had cervical symptoms that were more severe, that's what Petitioner complained about initially. He said Petitioner then had an onset of lumbar complaints, and that is all consistent with the date of injury in light of known tandem stenosis. Dr. Taylor testified that being able to verbalize the lumbar systems within a few weeks of the initial date of injury was very consistent with his mechanism of injury in light of the preexisting predisposing factor of tandem stenosis. He said tandem stenosis is not created by an accident. Taylor testified the instability at L4-5 and L5-S1 was permanently aggravated in the cervical and lumbar spine by the work event of August 23, 2018. His surgical recommendation of two level lumbar fusion due to a combination of instability at L4-5 and L5-S1 and tandem stenosis, is based on the findings of a physical examination, the total clinical picture, and his experience and practice. Taylor's records are comprehensive, detailed, and supported by references to medical publications. Petitioner's Exhibit 6 at 34, 35, 38, 39, 40, Exhibit 2. By the time of the hearing, Taylor had treated Petitioner for over a year.

Petitioner submitted to an independent medical examination by Dr. Donald deGrange, an orthopedic surgeon, on August 12, 2019. DeGrange testified Petitioner's accident was not a high energy trauma. It resulted in a strain to Petitioner's cervical and lumbar spine. He said he never heard of tandem stenosis, and Petitioner required no treatment for his lumbar spine. DeGrange said he does 100 IMEs a year, 90% for insurance companies or defendants, at $2,000.00 each. He said he had never seen a notation as tandem stenosis, and never answered as to whether he thought the condition legitimate. The findings in his report seemed equivocal. Respondent's Exhibit 3 at 6, 17, 25, 26, 33, 35, Exhibit B.

Petitioner submitted to another independent medical examination by Dr. Russell Cantrell, a physical medicine and rehabilitation physician, on November 19, 2018. Cantrell is not a surgeon. Cantrell testified his examination of Petitioner's lumbar was unremarkable. He did not attach a diagnosis to Petitioner's lumbar spine, calling it mechanical low back pain without explanation or definition. He thought Petitioner's lumbar pain not related to the work incident. He testified tandem stenosis is a legitimate condition. Respondent's Exhibit 4 at 6-7, 24, 16-17.

Petitioner testified he wants to have the low back surgery. Roesch at 22.

Conclusions of Law

Disputed issue **F** is, is Petitioner's current condition of ill-being causally connected to the injury sustained by Petitioner August 23, 2018. To obtain compensation under the Act, an employee must establish, by a preponderance of the evidence, a causal connection between a work related injury and the employee's condition of ill-being. Vogel v. Illinois Workers' Compensation Commission, 354 Ill. App. 3d 780, 786 (2005). In preexisting cases, recovery depends on an employee's ability to show that a work related accidental injury aggravated or accelerated a preexisting condition such that the employee's current condition of ill-being can be said to have been causally connected to the work injury, not simply the result of a normal degenerative process of the preexisting condition. Employers take their employees as they find them. Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. Sisbro v. Industrial Commission (Rodriguez), 2007 Ill. 2d 193, 204-205 (2003).

As to causal connection, there is conflicting medical testimony between Petitioner's treating physicians and the two physicians retained by Respondent to perform Section 12 medical examinations. Although not required or obligated to give more weight to a treating physician than that of an examining physician, See Prairie Farms Dairy v. Industrial Commission, 279 Ill. App. 3d 546, 550-51 (1996), I do so here based on Dr. Taylor's lengthy treatment of Petitioner; his clear, comprehensive testimony; and his comprehensive, detailed, and referenced records.

I find as a conclusion of law, Petitioner's current condition of ill-being, in both the cervical and lumbar spine, causally related to the injury sustained August 23, 2018.

I rely on the testimony and records of Dr. Brett Taylor. He is in a superior position to Dr. deGrange, who seemingly had no knowledge of tandem stenosis, and Dr. Cantrell, who is not a surgeon. Taylor has performed surgery on Petitioner and, unlike either deGrange or Cantrell, has seen Petitioner and treated him for a long time. While deGrange was equivocal, Taylor was definitive.

Disputed issue **J** is, is Respondent responsible for unpaid medical bills. An employer shall pay according to a fee schedule or negotiated rate, all necessary first aid, medical services, and hospital services incurred, reasonably required to cure or relieve from the effects of an accidental injury. 820 ILCS 305/8a. Petitioner claims Respondent is responsible for such expenses relating to the lumbar spine. Respondent accepts responsibility for other than the lumbar spine. To the extent there remain unpaid bills for medical or hospital services incurred for other than the lumbar spine, those charges are specifically awarded, subject to the fee schedule or negotiated rate. Given the causal connection of the lumbar spine, and findings to follow, Respondent is responsible for services for the lumbar spine.

Disputed issue **K** is, is Petitioner entitled to prospective medical care. Specific procedures that have been prescribed by a medical service provider are incurred within the meaning of Section 8(a), even if they have not been performed or paid for. Questions regarding

entitlement to prospective medical care under 8(a) are factual inquiries. Dye v. Illinois Workers' Compensation Commission, 2012 Ill. App (3d) 100907 WC.

Dr. Taylor proposes a procedure on Petitioner's low back, lumbar fusion, for identified lumbar instability at L4-5 and L5-S1. He testified the need for surgery proposed on the lumbar area is causally connected to the accident of August 23, 2018, and due to a combination of instability and tandem stenosis.

I find, as a conclusion of law, Petitioner is entitled to this prospective surgery, and rely on Dr. Taylor, who I find credible, sensible, and whose explanations are comprehensive.

Arbitrator

4.27.2022
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Trinidad Castillo,
Petitioner,

21IWCC0032

vs.

NO: 16 WC 21316

Consolidated Container Corp,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2020, is hereby affirmed and adopted.

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

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

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

DATED: JAN 25 2021
o1/7/21
DLS/rm
046

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0032

CASTILLO, TRINIDAD
Employee/Petitioner

Case# **16WC021316**

CONSOLIDATED CONTAINER CORP
Employer/Respondent

On 4/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1922 SALK, STEVEN B & ASSOC LTD
DAMIAN R FLORES
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

0507 RUSIN & MACIOROWSKI LTD
PATRICK J JESSE
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

21IWCC0032

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

Trinidad Castillo
Employee/Petitioner

v.

Consolidated Container Corp.
Employer/Respondent

Case # **16** WC **21316**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Wheaton**, on **October 23, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **3-15-2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$43,499.04**; the average weekly wage was **$836.52**.

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

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

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

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

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

ORDER

Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of his employment with respondent and further failed to prove by a preponderance of the evidence that his condition of ill-being was causally connected to his work activities with respondent. Petitioner's claim for compensation is denied.

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

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

Signature of Arbitrator

March 27, 2020
Date

APR 2 - 2020

ARBITRATOR'S FINDINGS OF FACT

Procedural History

Petitioner, Trinidad Castillo, filed an Application for Adjustment of Claim alleging repetitive trauma injuries that manifested on or about April 7, 2016. The parties proceeded to Arbitration on October 23, 2018. The disputed issues at trial were accident, notice, causal connection, medical bills, penalties and the nature and extent of petitioner's injuries. (See Arbitrator Exhibit #1).

Prior to proofs being opened, petitioner changed the manifestation date from April 7, 2016 to March 18, 2016. At the conclusion of petitioner's testimony on cross-examination, the manifestation date was changed again to March 15, 2016. (Tr. 5).

Testimony of Petitioner

Petitioner testified that he has worked for the respondent since June of 1999. (Tr. 10). Petitioner testified that he has worked as a forklift driver for the respondent for the last six years. (Tr. 11). Petitioner testified that he would sometimes work between eight and twelve hours a day. (Tr. 13).

In terms of his forklift duties, petitioner operated two seated forklifts, both of which were gas powered. Petitioner was required to change out the propane tanks on the back of the forklift once or twice per work day. This required petitioner to lift a 35 pound tank to approximately chest height with both arms. (Tr. 16-18).

Petitioner testified that he typically drove his forklift seven to eight hours during the course of his regular shift. Petitioner testified that he would use his left arm to operate the steering wheel and his right arm to operate the gear shift. Petitioner testified that his left arm would be approximately chest height while driving. (Tr. 18-20).

Petitioner explained that when a load is too high, he cannot drive forward as his view would be obstructed. Petitioner testified that he is then required to drive the forklift in reverse. Petitioner testified that approximately half of the time (three to four hours during a shift) he is required to operate the forklift in reverse. (Tr. 20-21). Petitioner testified that when driving in reverse, he would position his left arm at the top of the steering wheel and look over his right side. (Tr. 22-23). Petitioner testified that during a normal shift, he is required to turn his head to the right side approximately 300 times. (Tr. 23).

In addition to his forklift driving duties, petitioner would also assist on the packing lines. (Tr. 14). While working on the packing line, petitioner's job required him to take bottles and place them in a box. Petitioner testified that he would pack approximately 460 bottles an hour. The

boxes would be then stacked to shoulder height and moved on a pallet. (Tr. 14). Petitioner testified that the boxes weight 15 pounds and that he packed approximately 40 to 50 boxes per hour. (Tr. 14-15).

Petitioner testified that prior to March of 2016, he did not have any treatment for his neck or left shoulder. (Tr. 23).

Petitioner testified that his family doctor was Dr. Jorge Brunelle. Petitioner testified that he treats with Dr. Brunelle for his diabetic condition. Petitioner testified that he would also report any other problems with his body to Dr. Brunelle during regular follow-ups for his diabetic condition. (Tr. 24-25).

Petitioner testified that he began to notice pain in his neck all the way down his left arm while driving his forklift. Petitioner testified that he had a regularly scheduled appointment with Dr. Brunnelle on March 15, 2016 for his diabetic condition. (Tr. 26). Petitioner testified that he reported shoulder pain to Dr. Brunelle and an x-ray was ordered. (Tr. 26).

During his cross examination, petitioner testified that he did not remember going to Dr. Brunelle for his neck and shoulder problems on March 15, 2016. (Tr. 47). Petitioner was also not sure if he told Dr. Bruenelle on that date whether his neck was bothering him in addition to his left shoulder. (Tr. 47-48). Petitioner also testified that he was sure he told Dr. Burnelle that he thought his neck and left shoulder problems were related to work. (Tr. 48). Specifically, petitioner testified on cross that he told Dr. Brunelle that his left shoulder and neck complaints were due to packing bottles and working on the line. (Tr. 52).

Petitioner agreed that Dr. Brunelle would be writing down contemporaneous notes during their office visits regarding the complaints petitioner reported. The Arbitrator notes that the medical records from Dr. Brunelle dated March 15, 2016 make no mention of any neck problems. Furthermore the records do not make any mention whether petitioner reported that his shoulder problem was related to work. The record simply states that petitioner had active problems of "left shoulder pain" and an x-rays of the shoulder were performed. (Res. Ex. #2).

On cross-examination, petitioner was asked about the March 18, 2016 amended manifestation date. Petitioner agreed that he sought no medical treatment on that date. Petitioner agreed that nothing unusual happened on that date other than the fact that he worked. (Tr. 51-52).

Petitioner testified that he followed up with Dr. Brunelle on March 23, 2016. Petitioner testified that he discussed the cause of his pain with Dr. Brunelle. Petitioner testified that it was at this time (March 18, 2016), that he realized his condition was work related. (Tr. 27-28). According to his testimony, petitioner attributed his neck and arm pain to operating the steering wheel on his forklift. (Tr. 28).

On cross-examination petitioner testified that Dr. Brunelle was making contemporaneous notes regarding petitioner's complaints during the March 23, 2016 visit. Petitioner testified that he reported neck and left shoulder pain to the doctor. (Tr. 49-50). The Arbitrator notes that the medical records from Dr. Brunelle dated March 23, 2016 make no mention of neck problems or complaints. (Res. Ex. #2). The chief complaint listed on March 23, 2016 included uncontrolled "HTN", slight dizziness and dry mouth. Petitioner was diagnosed with diabetes and uncontrolled hypertension. (Res. Ex. #2).

Petitioner testified that continued to work for the respondent after seeing Dr. Brunelle in March of 2016. Petitioner testified that his left arm pain worsened. Petitioner testified that he eventually reported the injury to Mr. Ivan Juarez, a supervisor for the respondent. (Tr. 29). Petitioner testified on cross-examination that he first reported the problems to the employer on April 7, 2016. Petitioner agreed that this was approximately three and a half weeks after he told Dr. Brunelle that his neck and shoulder problems were work related. (Tr. 51).

Petitioner testified that after he reported the injury, he was sent to the company clinic at Tyler Medical Services. (Tr. 29). Petitioner testified that he first sought medical treatment at Tyler on April 11, 2016. Petitioner testified that he only related his neck and shoulder complaints to his forklift driving duties and not his line operation/bottle packing activities. (Tr. 53). Petitioner testified that he was given topical ointments and pain medications. Petitioner testified that he continued to work full duty and that his pain persisted. (Tr. 30).

Petitioner testified that he underwent physical therapy at Tyler Medical in April and May of 2016. Petitioner testified that he was referred for an MRI of his left shoulder and cervical spine. Petitioner testified that after undergoing the MRI studies, he came under the care of Dr. Matthew Ross, a neurosurgeon. (Tr. 30-33). Petitioner testified that he treated in the past with Dr. Matthew Ross for low back complaints. Petitioner testified that he trusted Dr. Ross as he had a good reputation. (Tr. 55-56). Petitioner testified that Dr. Ross reviewed the MRI of the neck and recommended that petitioner seek an evaluation with a shoulder specialist. (Tr. 33). Petitioner specifically recalled Dr. Ross telling him that he did not have a neck problem. Petitioner testified that Dr. Ross advised him to continue to work full duty as a fork lift driver. (Tr. 55-56).

Petitioner testified that he did not seek treatment with a shoulder specialist as he was "traumatized" and "could not remember". (Tr. 33). Petitioner could not recall if he was referred to Rehab Dynamix by Dr. Ross. (Tr. 56). Petitioner did not know how he became a patient at Rehab Dynamix. (Tr. 58). Petitioner agreed that Rehab Dynamix was over an hour from where he lived in Aurora. (Tr. 59-60). The Arbitrator notes that the records from Rehab Dynamix reflect that petitioner was referred by their facility to Dr. Sclamberg. (Pet. Ex. # 4).

Petitioner testified that he was evaluated by a chiropractor, Dr. Kowalkowski. Petitioner testified that the chiropractor ordered an MRI of the left shoulder and chiropractic therapies for both the neck and the shoulder. (Tr. 35, 56). Petitioner acknowledged that the neck treatment was after

Dr. Ross had told him that he did not have a neck problem. (Tr. 57). Petitioner testified that he performed exercises at Rehab Dynamix for his neck and left shoulder complaints. (Tr. 63).

Petitioner testified that after undergoing the left shoulder MRI, he was referred by Dr. Kowalkowski to Dr. Steven Sclamberg, an orthopedic surgeon. (Tr. 35).

Petitioner testified that he initially saw Dr. Sclamberg on July 25, 2016. Petitioner testified that Dr. Sclamberg injected his left shoulder and prescribed additional therapies. (Tr. 36). Petitioner testified that he continued to work as a forklift driver for respondent at this time. (Tr. 36).

Petitioner testified that he also sought pain management treatment with Dr. Axel Vargas at the referral of Rehab Dynamix. (Tr. 36-37). On cross, petitioner agreed that he reported the history of an acute event to Dr. Vargas on March 18, 2016, in which petitioner was lifting a 40 to 50 pound gas tank and felt an onset of pain. (Tr. 59-60).

Petitioner testified that he improved approximately 60-70% with the shoulder injection and therapy prescribed by Dr. Sclamberg. (Tr. 38). Petitioner testified that he completed physical therapy in September of 2016. Petitioner did not follow up with Dr. Sclamberg until January of 2017. Petitioner testified that he waited four and half months to follow up due to personal issues related to his wife and daughter's health. (Tr. 38-39).

Petitioner testified that he continued to work for respondent. Petitioner followed up with Dr. Sclamberg in January of 2017 and was prescribed additional therapy. Petitioner testified he opted not to undergo additional therapy due to his personal and family issues. Petitioner was seen by Dr. Sclamberg for the final time on March 13, 2017. (Tr. 39 – 40).

Petitioner testified that prior to March of 2016, he had never injured his neck before. On cross-examination, Petitioner testified that he was involved in a motor vehicle accident on October 17, 2015. Petitioner testified that he was rear ended by a car traveling approximately 40 to 60 miles. Petitioner testified that he had to be transported to a local hospital for treatment. Petitioner testified that he injured his back at the time of the accident. Petitioner then testified that he was not denying that he injured his neck either. Petitioner then testified that he only injured his back at the time of the motor vehicle accident. (Tr. 42-43).

Petitioner admitted however that it was possible he underwent a CT scan of his neck following the accident. Petitioner further admitted that his head struck the front mirror in his car at the time of impact. Petitioner testified that he sought medical treatment at Nuestra Clinical following the motor vehicle accident. When asked if he underwent treatment for his neck at Nuestra Clinica, petitioner responded that, "The doctor checks everything". After further questioning, petitioner conceded that he did have treatment to his neck following the October 17, 2015 motor vehicle accident prior to the alleged accident sometime in March of 2016. (Tr. 44-45). Petitioner further admitted that he reported worsening pain to his therapist in November of 2015 while at work or performing forceful activities. (Tr. 45-46).

Petitioner testified that he sued the driver that rear-ended him. Petitioner testified that he settled that claim. Petitioner did not recall how much received for his pain and suffering related to that claim but believed it was more than $10,000. (Tr. 45-46).

Petitioner testified that he continues to work his regular duties a forklift driver for the respondent. Petitioner testified that he is better, but not a hundred percent. Petitioner testified that he will still notice neck and shoulder pain when he moves his hands a lot during work. Petitioner rated the complaints as a 4 to 5 out of 10. Petitioner testified that he will manage his complaints with Ibuprofen medication two to three a week. Petitioner denied that he took pain medication for any problems involving his neck or left shoulder prior to March of 2016. (Tr. 41). Petitioner testified that his ability to earn has not been affected by the alleged work accident. (Tr. 65).

During re-direct examination, petitioner changed his manifestation date for the third time. The new date, per petitioner's testimony on redirect was March 15, 2016. (Tr. 66-67). Petitioner maintained his earlier testimony that he had neck complaints on March 15, 2016. (Tr. 68). Petitioner denied reporting neck pain as well relative to the prior visits with Dr. Brunelle on December 19, 2015 and February 15, 2016. (Tr. 69). Petitioner reiterated that he felt his neck and left shoulder complaints were due to driving a forklift. (Tr. 70).

Testimony of Ivan Juarez

Respondent called Ivan Juarez to testify. (Tr. 71). Mr. Juarez testified that he worked for respondent as a production supervisor. (Tr. 71). Mr. Juarez testified that he sometimes supervised petitioner as he (Juarez) worked the day shift and petitioner worked third shift. Mr. Juarez explained that there shifts would overlap. (Tr. 72). Mr. Juarez testified that there was no assigned supervisor to third shift. (Tr. 72).

Mr. Juarez testified that he was familiar with petitioner's job duties a forklift driver. (Tr. 73). Mr. Juarez testified that he used to drive a forklift for the respondent. (Tr. 73). Mr. Juarez testified that the forklift has power steering and it was not forceful to drive the forklift. Mr. Juarez compared it to driving a car. (Tr. 73). Mr. Juarez testified that petitioner is not required to perform any overhead work activities as a forklift driver. Mr. Juarez agreed with petitioner in that the gas tank is changed out one to two times per shift. (Tr. 74). Mr. Juarez testified that no overhead activity is involved with changing the gas tank. (Tr. 74).

Mr. Juarez recalled having a conversation with petitioner on April 7, 2016. Mr. Juarez testified that petitioner approached him at the end of his shift and indicated that his shoulder was in pain and bothering him (Tr. 74). Mr. Juarez testified that petitioner did not tell him what the cause of his shoulder pain. (Tr. 75). Mr. Juarez asked petitioner if he thought the problem was work-related and petitioner told him that he could not remember. (Tr. 75). Mr. Juarez testified that petitioner could not recall any specific incident that caused his pain. (Tr. 75). Mr. Juarez denied that petitioner mentioned anything to him in March of 2016 regarding shoulder or neck pain (Tr. 75).

On cross-examination, Mr. Juarez testified that petitioner is a good employee. (Tr. 76). Mr. Juarez testified that while he has driven a forklift in the past, he has not done so with the same consistency as the petitioner. (Tr. 77). Mr. Juarez was unsure if he and petitioner had worked an entire shift together in the months before the accident. (Tr. 77). Mr. Juarez testified that as part of his supervisory duties, he is required to fill out accident reports. Mr. Juarez testified that his boss, Darren Dunning while also complete accident reports. (Tr. 78-79).

Mr. Juarez was not sure whether an accident report was completed in this matter. (Tr. 79). Mr. Juarez did not recall petitioner reporting any work-related injury to him. (Tr. 79). Mr. Juarez was not sure if petitioner reported that he sustained an injury to Mr. Dunning. (Tr. 79).

On re-direct examination, Mr. Juarez testified that he did not fill out any reports but he did notify his superior, Mr. Dunning, about what petitioner reported to him. (Tr. 80). Mr. Juarez testified that petitioner did not report anything work-related to him and that petitioner did not recall how he injured himself. (Tr. 81-82).

Petitioner offered the first report of injury. (Pet. Ex. #11). The report indicates that petitioner's date of injury was "March 18, 2016". The reports noted that petitioner notified the employer on April 7, 2016. The reports states that petitioner told the employer that around March 18, 2016 he experienced pain in his neck, left shoulder blade to elbow from repetitive movement of driving a forklift. The report was completed by Darren Dunning. (Pet. Ex. #11).

Medical Evidence

Records from petitioner's primary care provider, Dr. Jorge Brunelle, related to both pre and post-accident treatment were admitted into evidence as Respondent's Exhibit #2.

Records from March 15, 2016 indicate that petitioner presented to Dr. Brunelle with complains of left shoulder pain, amongst other problems as well. (Res. Ex #2). The main purpose of the visit was a follow up relative to petitioner's diabetes. The note does not mention any complaints relative to the cervical spine. There is no mention regarding the cause of petitioner's left shoulder complaints. The record indicates that shoulder x-rays were performed, however there is no mention in the record as to the results. The records state that petitioner was diagnosed with pain in the left shoulder and advised to return to the clinic in one to two weeks. (Res. Ex #2).

Petitioner was evaluated by Dr. Brunelle on March 23, 2016. The records reflect that petitioner's primary complaints were hypertension, slight dizziness, and a dry mouth. No diagnoses or treatment recommendations were given relative to the shoulder or cervical spine. There is no mention of any work-related injury per the medical records of Dr. Brunelle. (Res. Ex. #2).

Subsequent to reporting his complaints to the employer-respondent, petitioner began treatment at the company Clinic, Tyler Medical Services. The initial treatment notes, dated April 11, 2016, indicate that petitioner reported an onset of neck and left shoulder pain that began four weeks

prior. Petitioner attributed his complaints to "repetitively" driving his forklift, specifically steering and turning his head. (Pet. Ex. #2). Petitioner reported that he sought treatment with his primary care provider, Dr. Brunelle, for this problem and that x-rays of the neck and shoulder were obtained. Petitioner reported that he was told he has "arthritis" and "pulled muscles" and no further treatment was recommended. Petitioner denied any prior injuries to his neck or shoulder.

Petitioner was examined and diagnosed with a left cervical and trapezius strain. Petitioner was prescribed muscle relaxers, over the counter Tylenol and topical ointments. Petitioner was released to return to work without restrictions. (Pet. Ex. #2).

Petitioner followed up at Tyler on April 15, 2016. Petitioner did not report any significant changes in his complaint. It appears the provider was able to obtain the x-ray of the left shoulder from Dr. Brunelle. The study was interpreted to be normal. Petitioner was diagnosed with a persistent left shoulder rotator cuff strain, left trapezius strain and left cervical spine strain. Petitioner was given a referral for physical therapy. Petitioner was advised that he could continue to work without restrictions. (Pet. Ex. #2).

On April 26, 2016, petitioner began physical therapy at Tyler Medical Services. Petitioner underwent six therapy sessions with no significant improvement. Petitioner returned to the company doctor, Dr. Pappas, on May 11, 2016. Petitioner reported that his symptoms were the same. Petitioner reported radicular complaints down his left arm. Dr. Pappas diagnosed petitioner with a left cervical and trapezius muscle strain and a left shoulder strain. Due to the persistent nature of petitioner's complaints, Dr. Pappas ordered a cervical MRI. Petitioner was advised that he could continue to work his regular duties as a forklift driver. (Pet. Ex. #2).

Petitioner underwent a cervical MRI on May 19, 2016. The study was positive for cervical spondylosis and disc protrusions at C3-4 and C4-5. (Pet. Ex. #2).

Petitioner returned to Dr. Pappas to review the results of the cervical MRI on May 23, 2016. Dr. Pappas opined that petitioner had cervical disc protrusions at C3-4 and C4-5. Petitioner was given a referral to Dr. Matthew Ross, a neurosurgeon. It was noted that petitioner could continue working his regular duties as a forklift driver. (Pet. Ex. #2).

On June 6, 2016, petitioner was evaluated by Dr. Matthew Ross. Petitioner told Dr. Ross that during the first week of March of 2016, he began to experience some pain in the left shoulder and neck. Petitioner reported that the pain occurred when operating a forklift. Petitioner could not recall any specific trauma or incident. Petitioner reported that he kept working and his pain became progressively worse. Dr. Ross examined petitioner and review the May 19, 2016 cervical MRI study. Dr. Ross opined that the study revealed tiny disc protrusions at C3-4 and C4-5. Dr. Ross noted that there were no findings of any nerve root impingement and that petitioner had a "remarkably young" looking neck. (Pet. Ex. #3).

Dr. Ross opined that petitioner's complaints were likely due to shoulder pathology as opposed to any condition in the cervical spine. Dr. Ross told petitioner to seek evaluation with an orthopedic shoulder specialist. Petitioner was advised that he could continue to work full duty and return on an as needed basis. (Pet. Ex. #3).

Petitioner did not seek an evaluation with an orthopedic shoulder specialist. Instead petitioner sought treatment at Rehab Dynamix in Chicago. (Pet. Ex. #4). The initial treatment records from Rehab Dynamix dated July 6, 2016 indicate that petitioner reported an onset of symptoms of "March 18, 2016". Petitioner reported that he experienced neck pain and irritation in his left shoulder for several weeks at work. Petitioner reported that he was unaware that he was told by Dr. Ross to see a shoulder specialist. Petitioner reported that he was still working his regular duties. Petitioner denied any similar symptoms prior to his onset date of "March 18, 2016". (Pet. Ex. #4).

Petitioner was examined by a chiropractor, Dr. Kowalkowski. The chiropractor diagnosed petitioner as having cervical radiculopathy and left shoulder impingement. Chiropractic modalities were recommended to the petitioner for both the left shoulder and cervical spine. Petitioner was also given an order to undergo a left shoulder MRI and follow up with an orthopedic specialist. (Pet. Ex. #4). It appears that the records from the chiropractor were changed later on to reflect an onset date of "April 7, 2016". (Pet. Ex. #4).

On July 14, 2016, petitioner underwent an MRI of the left shoulder. The findings were only positive for supraspinatus tendinopathy without any tears. (Pet. Ex. #4).

At the referral of Rehab Dynamix, petitioner underwent an evaluation with Dr. Steven Sclamberg, an orthopedic surgeon, on July 25, 2016. Petitioner presented with complaints of left shoulder pain. Petitioner reported a history of operating two different forklifts for the employer and using his left arm to control the machines. Petitioner also reported that he was required to lift gas tanks slightly above shoulder. Petitioner reported that his symptoms had been ongoing for some time and at least "since March". Work status reports documented that petitioner reported an injury on "March 18, 2016". The records reflected that petitioner was still working regular duty at the initial visit. (Pet. Ex. #5).

Dr. Sclamberg reviewed the MRI study of the left shoulder and examined petitioner. Dr. Sclamberg diagnosed petitioner with left shoulder impingement syndrome and tendonitis. Dr. Sclamberg gave petitioner an injection into the subacromial space and ordered an additional four weeks of therapy. (Pet. Ex. #5).

On July 27, 2016, petitioner was evaluated by Dr. Axel Vargas, a pain management physician, at the referral of Rehab Dynamix. Petitioner reported a history of an acute event to Dr. Vargas on March 18, 2016 in which petitioner was lifting a 40-50 pound gallon gas tank and experienced an onset of neck pain with radiation. (Pet. Ex. #5). Petitioner reported 9 out of 10 neck pain to Dr. Vargas. Petitioner also reported an inability to lift objects.

Dr. Vargas examined petitioner's neck, left shoulder and lower back. Dr. Vargas diagnosed petitioner with cervical radiculopathy, cervical facet syndrome and disc herniations at C3-4 and C4-5. Regarding the shoulder, Dr. Vargas diagnosed petitioner with left shoulder pain and an internal derangement. (Pet. Ex. #5). Dr. Vargas recommended that petitioner undergo an EMG of the upper extremity. Dr. Vargas prescribed a multitude of medications including: Tramadol, Flexeril, Omeprazole, Meloxicam, and Gabapentin. Dr. Vargas recommended that petitioner continue therapy for his cervical spine. (Pet. Ex. #5).

Petitioner continued to undergo chiropractic treatment at Rehab Dynamix until August 10, 2016. Petitioner transitioned himself to work conditioning. Petitioner completed work conditioning at Rehab Dynamix on September 16, 2016. (Pet. Ex. #4). At the time of discharge on September 16, 2016, petitioner reported 50% improvement in his complaints. (Pet. Ex. #4).

On August 17, 2016, petitioner underwent an EMG study. The study was interpreted as only being positive for left sided ulnar neuropathy. The examiner noted that the findings did not correlate with petitioner's pain complaints. (Pet. Ex. #6).

Petitioner returned to Dr. Vargas on August 24, 2016. The notes reflect that petitioner's symptoms all began after an injury at work on March 18, 2016. (Pet. Ex. #5).

Dr. Vargas reviewed the EMG study he ordered and noted that the findings were negative for cervical radiculopathy. Dr. Vargas noted that the only positive findings were left sided ulnar neuropathy. (Pet. Ex. #5).

Given the negative findings on the MRI and the EMG, Dr. Vargas did not believe petitioner required additional pain management. Accordingly, Dr. Vargas discharged petitioner at the second visit and placed him at MMI for his neck complaints. (Pet. Ex. #5).

Petitioner was evaluated by Dr. Sclamberg on August 29, 2016. Petitioner reported 60-70% improvement. Petitioner denied any neck pain. Dr. Sclamberg diagnosed petitioner with improving left shoulder impingement. Dr. Sclamberg recommended that petitioner continue therapy and return in a month. Petitioner was kept on a 10 pound lifting restriction. (Pet. Ex. #5).

Petitioner did not return to Dr. Sclamberg until January 10, 2017. Office records from that date indicate that petitioner was still complaining of left anterior shoulder pain. Petitioner denied any neck complaints or pain. Dr. Sclamberg examined petitioner and diagnosed him with mildly improved left shoulder impingement. An additional six weeks of PT was ordered. Petitioner was given a 10 pound lifting restriction. (Pet. Ex. #5)

Petitioner was last seen by Dr. Sclamberg on March 13, 2017. Petitioner reported that he was "doing great". Petitioner did not make any complaints. Petitioner's examination findings revealed full range of motion and strength in the left shoulder with negative impingement signs.

Dr. Sclamberg released petitioner from his care and placed him at MMI. Petitioner was not given any restrictions. (Pet. Ex. #5).

Testimony of Dr. David Garelick

Respondent's IME, Dr. David Garelick, testified via evidence deposition on February 28, 2018. (Res. Ex. #1). Dr. Garelick testified that he is a board certified orthopedic surgeon (Res. Ex. #1 – Pg. 6). Dr. Garelick testified that approximately 1 to 2% of his practice is devoted to medical legal matters, such as IMEs. (Res. Ex. #1, Pg. 7-8). Dr. Garelick testified that a regular part of his practice is treating conditions involving the shoulder. (Res. Ex. #1, Pg. 8).

Dr. Garelick testified that he performed an independent medical examination of petitioner at the request of respondent on July 18, 2016. (Res. Ex. #1, Pg. 8). Dr. Garelick testified that petitioner reported a history of developing pain in his neck and left shoulder while driving a forklift in March of 2016. (Res. Ex. #1, Pg. 9-10). Dr. Garelick testified that he asked petitioner if he performs any overhead work. Dr. Garelick testified that petitioner denied any overhead activities as part of his job duties with respondent. (Res. Ex. #1, Pg. 10).

Dr. Garelick testified that he review the petitioner's medical records from Tyler Medical Services, the records of Dr. Matthew Ross, and the MRI film of the left shoulder obtained on July 14, 2016. (Res. Ex. #1, Pg. 11-12). Dr. Garelick testified that the left shoulder MRI revealed a cyst around the subscapularis tendon. Dr. Garelick testified that the remainder of the study was unremarkable. (Res. Ex. #1, Pg. 12). Dr. Garelick noted that there appeared to be an overlap in petitioner's symptoms between the neck and the left shoulder. Dr. Garelick testified that Dr. Ross did not believe petitioner's symptoms were related to the neck. Dr. Garelick found it significant that the May 23, 2016 record from Tyler Medical indicated that the left shoulder was asymptomatic. It was Dr. Garelick's impression that petitioner's left shoulder symptoms appeared to wax and wane. (Res. Ex. #1, Pgs. 12-13).

Dr. Garelick testified that he examined petitioner. Dr. Garelick's physical examination findings revealed decreased range of motion in the neck in all planes as well as nonspecific and global tenderness in the left shoulder. (Res. Ex. #1, Pgs. 13-14). Dr. Garelick noted a positive Neer's test. The rest of the physical examination findings were normal. (Res. Ex. #1, Pg. 14).

Dr. Garelick testified that he diagnosed petitioner subjective shoulder pain complaints without objective findings. Dr. Garelick did not believe that the petitioner's symptoms were causally related to petitioner's work activities. Dr. Garelick explained that petitioner's symptoms were consistent with impingement syndrome. Dr. Garelick noted that impingement is caused by overhead repetitive activity. Dr. Garelick did not believe that the diagnosis was related as there was no indication that petitioner performed overhead work for respondent. (Res. Ex. #1, Pgs. 15-16). Dr. Garelick noted that petitioner had normal MRI findings with the exception of the cyst near the subscapularis tendon. (Res. Ex. #1, Pgs. 17-18). Dr. Garelick opined that the cyst was an incident or degenerative finding that was not related to the alleged work activities. (Res. Ex. #1,

Pg. 18). Dr. Garelick testified that it was his opinion that petitioner had reached MMI for his alleged condition at the time of his examination. (Res. Ex. #1, Pgs. 18). Dr. Garelick opined that the treatment petitioner underwent at Tyler Medical was reasonable, but did not believe that the treatment was related to any work related accident. (Res. Ex. #1, Pgs. 18-19).

On cross-examination, Dr. Garelick testified that his examination was limited to the left shoulder and that he would defer to a spine specialist for any opinions regarding the neck. (Res. Ex. #1, Pg. 22). Dr. Garelick testified that he did not attribute any of petitioner's left shoulder complaints during the examination to the cyst that was seen on the MRI. (Res. Ex. #1, Pg. 23).

Dr. Garelick testified that he did not review a formal job description from the employer and did not have any idea as to how long petitioner drove a forklift. (Res. Ex. #1, Pg. 25). Dr. Garelick testified that he did not have any formal information regarding petitioner's posture as he drove the forklift. Dr. Garelick testified that he did not have any idea regarding the type of force required to drive the forklift. (Res. Ex. #1, Pg. 25-26).

Dr. Garelick agreed that it was possible to have an overlap of shoulder and neck symptoms. (Res. Ex. #1, Pg. 26-27). Dr. Garelick agreed that he did not find any symptom magnification on behalf of the petitioner and he felt that petitioner was a credible historian. (Res. Ex. #1, Pg. 26-27). Dr. Garelick testified that if provided further information that petitioner performed heavy overhead lifting, then his opinions could potentially change. Dr. Garelick did not believe that heavy lifting to chest height would change his opinions. (Res. Ex. #1, Pgs. 28-30).

Dr. Garelick testified that there were no records supplied to him to indicate that petitioner had prior treatment or problems involving his shoulder. (Res. Ex. #1, Pgs. 28-29). Dr. Garelick agreed that the only diagnostic studies he reviewed were the left shoulder MRI. (Res. Ex. #1, Pg. 28-30).

CONCLUSIONS OF LAW

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

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he or she suffered a disability injury that arose out of and in the course of the claimant's employment. An injury occurs "in the course of employment" when it occurs during employment and at a place where the claimant may reasonably perform employment duties and while a claimant fulfills those duties or engages in some incident employment duties. An injury "arise out of" one's employment if it originates from a risk connected with, or incident to, the employment and involves a causal connection between the employment and the accidental injury.

Petitioner has claimed that he sustained repetitive trauma injuries to his neck and left shoulder as a result of his forklift driving duties for the respondent. The Arbitrator notes that petitioner amended his manifestation date three times during the course of Arbitration. At the time of filing his Application for Adjustment of Claim, petitioner alleged a manifestation date of April 7, 2016 (the same date he notified the employer of his problem). Petitioner changed that date at the start of trial to March 18, 2016. After cross-examination was completed, petitioner changed the date for a third time to March 15, 2016.

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission, 115 Ill.2d 524 (1987), the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction."

However, it is imperative that the petitioner place into evidence specific and detailed information concerning their work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. An employee who alleges an accidental injury due to a repetitive trauma must still meet the same burden of proof as other claimants alleging a specific accidental injury. Peoria County Bellwood Nursing Home at 530. There must be a showing that the injury is work related and not the result of the normal degenerative aging process. *Id.*

In a repetitive trauma claim, issues of accident and causation are intertwined. Therefore a review of the evidence allows both issues to be resolved together. Boettcher v. Spectrum Property Group and First Merit Venture Realty Group, 97 WC 44539, 999 I.C. 0961.

In reviewing the testimony, medical records, and opinions of the medical doctors, the Arbitrator finds that petitioner failed to meet his burden of proof with respect to proving a repetitive trauma injury involving his shoulder and neck and furthermore finds that petitioner failed to prove a causal relationship of his injuries to his work duties for respondent.

In support of this conclusion, the Arbitrator does not find petitioner to be credible. The Arbitrator notes that petitioner testified on direct that he never injured nor underwent treatment for his neck prior to March of 2016. However, petitioner admitted on cross that on October 17, 2015, he was involved in what appears to be a significant motor vehicle accident in which he was rear ended by a car traveling 40 to 60 miles per hour. Petitioner admitted that he required emergency treatment for these injuries. Petitioner admitted that his head struck the front mirror of his car at the time of impact and that he had underwent a CT scan of the neck.

Petitioner tacitly admitted that he underwent treatment for the neck at Nuestra Clinica and that he reported worsening pain to his therapist in November of 2015 while performing his work activities. Petitioner also admitted to receiving $10,000.00 for his pain and suffering from the

rear-end motor vehicle accident. The Arbitrator notes that this incident occurred approximately five months before petitioner's alleged repetitive trauma injuries. The Arbitrator further notes that the testimony of petitioner on direct was contradicted by his testimony on cross with respect to pre-accident neck complaints and treatment.

The Arbitrator also takes into account that petitioner's medical records all reference a manifestation date of March 18, 2016. However, the Arbitrator notes that when asked on cross-examination whether any unusual happened on that day, petitioner denied the same. There were no medical records of any treatment that day either.

While petitioner amended the date to March 15, 2016, there was no contemporaneous medical support contained within the records in order for the Arbitrator to find that petitioner did in fact sustain a repetitive trauma to his neck and shoulder. Notably, the treatment records from Dr. Brunelle on March 15, 2016, fail to document any work-related type injury and furthermore fail to document any neck complaints.

Petitioner admitted during his cross-examination that Dr. Brunelle took contemporaneous notes of petitioner's complaints during their office visits. The notes however fail to document any work related injuries or any complaints involving petitioner's cervical spine. The only documented condition in the March 15, 2016 record is left shoulder pain. While petitioner testified that he told Dr. Brunelle that he thought his condition was related to his work activities, there is nothing mentioned in the contemporaneous records. The Arbitrator assigns greater weight to the contemporaneous medical histories as opposed to petitioner's testimony.

As mentioned *supra*, it is imperative that the petitioner place into evidence specific and detailed information concerning their work activities, including the frequency, duration, manner of performing. The Arbitrator acknowledges that petitioner testified that he has to turn his head over his right side more than 300 times during the course of half of his shift when driving in reverse. Assuming a four-hour work shift, this equals approximately 1.25 repetitions *per minute* driving in reverse. The Arbitrator does not find this testimony to be believable or credible.

Regarding the issues of causal connection, the Arbitrator assigns greater weight to the opinions of Dr. Matthew Ross and respondent's Section 12 examiner, Dr. Garelick. The Arbitrator assigns less weight to the opinions of Dr. Sclamberg and Dr. Vargas.

As a preliminary matter, respondent objected to opinions contained within the treatment records of Dr. Sclamberg and Dr. Vargas, consultations that occurred within one week of petitioner filing his claim. (PX 5 and 6) Specifically, respondent raised a hearsay objection to the opinions of those doctors on the issue of causal relationship. Respondent argued that while the records were certified under Section 16, the records also contained opinions generated in anticipated of litigation.

The matter at hand was considered by the legislature and, thus, governed by Section 16 of the Act which states as follows:

> 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 the medical and surgical matters stated therein, but shall not be conclusive proof 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

In Shafer v. Ill. Worker's Comp. Comm'n, the Appellate court considered Section 16 of the Act and the employer's objection to medical bills offered into evidence by Petitioner. 2011 IL App (4th) 100505WC, ¶ 50. The Appellate court specifically noted that Section 16 was amended in 2005 to ease the foundational requirements for the admission of bills and records. Id. The court found the documents to be admissible pursuant to Section 16 of the Act because the bills were obtained pursuant to subpoena and that the Respondent had offered no evidence to rebut the statutory presumption that the records were true and correct. Id.

In RG Construction Services v. Ill. Worker's Comp. Comm'n, the Appellate court considered an employer's objection to the admissibility of medical records, obtained pursuant to a subpoena, which contained a medical opinion that specifically addressed causal connection. 2014 IL App (1st) 132137WC, ¶ 2. The employer asserted the records, including the casual connection statement, were not admissible because the doctor's notes contained opinions beyond the medical and surgical matters deemed admissible pursuant to Section 16 of the Act. Id at 38. In response, the Appellate court noted the employer cited no authority for the assertion other than Section 16 itself and further noted there was "no indication that the legislature intended to exclude a treating doctor's opinion, which was offered during the course of the doctor's treatment of the employee and memorialized in the doctor's treating records." Id. Ultimately, the Appellate noted Section 16 assisted in accomplishing the Act's goal of easing the foundation requirement for the admission of treating physicians' records and, thus, found the admission of the records to be proper. Id at 39.

In the case at hand, the records in question were subpoenaed by Petitioner from Lakeshore Medical Center (EX 5) and River North Pain Management (EX 6). Respondent objected to the causal connection statement stated therein, but provided no evidence to show that statements in dispute were authored for purposes of litigation. As in RG Construction Services, the records

meet the criteria set forth by Sections 16; the records of Dr. Sclamberg and Dr. Vargas are not narrative reports, do not specifically address Dr. Garelick's IME and, thus, were not prepared specifically for purposes of litigation. The Arbitrator, therefore, finds Petitioner Exhibits #5 and #6 to be admissible. Respondent had a right to cross examine those physicians on the bases of those opinions including their foundation for said opinions but chose not to depose the physicians. While true that the Act specifically excludes reports prepared by treating providers for use in anticipation of litigation, the Arbitrator declines to accept the argument that causal opinions contained in Petitioner's medical records were prepared specifically for litigation even though there is a solid argument made that they were. For these reasons, the Arbitrator admits into evidence the causal connection opinions of Drs. Sclamberg and Vargas and overrules respondent's hearsay objection to those opinions.

The Arbitrator declines to afford more weight to the causal connection opinions of Drs. Sclamberg and Dr. Vargas when compared to the opinions of respondent's Section 12 examiner Dr. Garelick and Dr. Matthew Ross.

Dr. Matthew Ross is the only spine specialist to offer opinions in this case. Dr. Ross was petitioner's treating physician. Dr. Ross examined petitioner, reviewed the cervical spine MRI and opined that petitioner did not have a neck problem. Dr. Ross believed petitioner needed further evaluation with a shoulder specialist. The Arbitrator adopts and finds that Dr. Ross' opinions are persuasive as compared to the other medical providers.

Dr. Garelick, an orthopedic shoulder specialist, testified credibly that petitioner's job duties did not cause his shoulder problems. The basis of the opinion was that petitioner told Dr. Garelick that he did not perform any overhead work activities. The testimony of petitioner by and large failed to include any history of overhead work duties. Dr. Garelick explained that tendinitis and impingement is caused by overhead activities. Dr. Garelick did not believe that petitioner's forklift driving duties (all of which were below shoulder) could cause impingement. The Arbitrator does not find any flaws or lack of foundation in Dr. Garelick's opinions and notes that the doctor is well-qualified to offer said opinions. The Arbitrator assigns greater weight to Dr. Garelick's testimony and opinions for these reasons.

Dr. Vargas' opinion is flawed and based upon an inaccurate history of accident. Dr. Vargas' records suggest that petitioner reported an acute trauma to the doctor when he lifted 40-50 pound gas tank on March 18, 2016 and experienced an onset of neck pain with radiation. The history as reported and relied upon by Dr. Vargas is inaccurate and flawed. Furthermore, Dr. Vargas is a pain doctor, not an orthopedic surgeon. Dr. Vargas diagnosis and opinions directly conflict with Dr. Matthew Ross' opinions. Furthermore, Dr. Vargas' testing failed to corroborate any findings consistent with cervical radiculopathy as the EMG study was completely negative for this diagnosis. The Arbitrator assigns very little weight to his opinions relative to the cervical spine and the causal relationship to petitioner's work activities.

Regarding the left shoulder and Dr. Sclamberg's opinions, the only record containing a statement regarding petitioner's work activities as reported to the doctor is the July 25, 2016 note. According to the record, petitioner told Dr. Sclamberg that he works on two different forklifts and has to use the hand as controls of his arm and gas up the machines and slightly above shoulder level at times. Since Dr. Sclamberg did not testify in this matter, the Arbitrator has to presume that this is the extent of Dr. Sclamberg's understanding of petitioner's work duties.

The Arbitrator notes that Dr. Sclamberg's records do not contain any indication that he understood the frequency or the amount of left arm/hand movements in a given shift. There is no indication in the records that Dr. Sclamberg was aware of the amount of times a day that petitioner would be required to change the gas tanks on the forklift. There is no indication that Dr. Sclamberg was aware of the amount of force required to operate the forklift and/or the fact that the machine had power steering.

The only potential overhead activity described in the records of Dr. Sclamberg involved changing the gas tanks. Even assuming that this activity was truly overhead, petitioner testified that at most, he would have to change the tank twice a shift and that he used both arms to do so. The Arbitrator notes that changing the gas tank twice per day would not be an activity that could be considered repetitive.

Furthermore, the stacking of boxes and packing activities as described by the petitioner do not appear at all in the records of Dr. Sclamberg. The Arbitrator cannot simply assume that Dr. Sclamberg was aware of this activity based upon his medical records. The testimony of petitioner reflected further that he only discussed the activities of driving and changing the gas tanks with Dr. Sclamberg. (Tr. 35-36). As such, there is no medical opinion in the record to tie petitioner's alleged left shoulder condition to the packing and stacking activities as described.

In summary, the Arbitrator does not find the opinions of Dr. Sclamberg to be persuasive and furthermore finds that petitioner failed to meet his burden of proof with respect to causal connection.

All other issues are moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL O'FARRELL,

Petitioner,

21IWCC0033

vs.

NO: 19 WC 15749
19 WC 15750

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 issue of penalties and fees under Sections 19(k), 19(l), and 16 of the Illinois Workers' Compensation Act, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

I. FINDINGS OF FACT

Petitioner, a laborer, sustained two right knee injuries on October 5, 2018 and March 27, 2019 while working in Respondent's Water Department. On October 5, 2018, Petitioner was traveling in the company service truck with other laborers when three gunshots were fired at the truck. Petitioner was seated behind the driver on a bench seat with two other laborers seated to his right. As one shot hit the front of the truck, the two laborers to Petitioner's right ducked over and collapsed on the outside of Petitioner's knee, pushing it against the door.

Petitioner presented to MercyWorks on the accident date and was diagnosed with a right knee sprain. He was prescribed diclofenac and ibuprofen, given knee exercises, and released to full duty work with no restrictions. Petitioner did not thereafter attend any medical follow-up visits for his right knee related to this accident. He continued to work full duty without restrictions

until his second accident on March 27, 2019.

On March 27, 2019, Petitioner was spinning the head off a hydrant when it disconnected from its stem with a magnet key still attached. Petitioner testified that he twisted as he tried to hold the hydrant head up, but he was not able to do so and followed over. He indicated that he did not fall, but he got close enough to the ground for the hydrant head to touch it. Petitioner testified that he immediately felt left low back pain, and later that evening, his knee started to bother him.

When Petitioner presented to MercyWorks on March 28, 2019, he complained of a sore left low back and described experiencing a twisting injury to his back. Dr. Steven Anderson diagnosed Petitioner with a lumbar strain, prescribed Tylenol and Flexeril, and kept Petitioner on full duty work with no restrictions. On the same date, Petitioner also signed a Report of Occupational Injury or Illness, in which he reported twisting his back in the accident.

On April 4, 2019, Petitioner returned to MercyWorks. In addition to his low back pain, Petitioner now reported right knee pain that started on March 29, 2019 after he did some of his back stretching exercises. Petitioner denied falling on his right knee but stated that he may have twisted it. X-rays of Petitioner's right knee were obtained and revealed moderate joint effusion with chondromalacia. Dr. Anderson noted that these X-rays showed mild degenerative changes and diagnosed Petitioner with a right knee strain along with the lumbar strain. Petitioner was kept on full duty work and advised to take Aleve and Flexeril.

At his return visits on April 18, 2019 and May 2, 2019, Petitioner told Dr. Anderson that his low back pain had improved but his right knee pain persisted. Dr. Anderson kept Petitioner on full duty, provided a right knee stabilizer brace, prescribed baclofen, and ordered an MRI. On May 12, 2019, the right knee MRI revealed highly complex tearing at the posterior horn of the medial meniscus with surrounding inflammation, a large nondisplaced subchondral fracture of the medial tibial plateau with severe surrounding marrow edema, and patellofemoral chondromalacia. After reviewing the MRI on May 16, 2019, Dr. Anderson diagnosed Petitioner with a right medial meniscal tear and discharged him with a referral to Dr. Michael Maday. It was also noted at this visit that Petitioner's lumbar strain had resolved and Petitioner had denied any low back pain.

On June 4, 2019, Petitioner presented to Dr. Maday of Midland Orthopedic Associates. Dr. Maday indicated that while adjusting a fire hydrant two and a half months prior, Petitioner had noted increased pain and swelling over the medial aspect of his knee. Dr. Maday recommended arthroscopic surgery to address Petitioner's meniscal pathology. He also provided light duty work restrictions of no squatting, kneeling, prolonged standing, and walking. Petitioner testified that Respondent did not have any light duty available, so he then went off work without benefits.

On August 13, 2019, Petitioner presented for a Section 12 examination with Dr. Thomas Gleason at Respondent's request. Dr. Gleason opined that the current status of Petitioner's right knee and the findings on his right knee MRI were unrelated to the alleged work accident. Instead, Dr. Gleason believed that Petitioner's MRI findings were suggestive of a chronic preexisting injury. Dr. Gleason indicated that Petitioner had no current symptomatic musculoskeletal condition related to the accident and had reached MMI as to any causally related injury, which included his low back strain and/or exacerbation of a preexisting condition.

Although Dr. Gleason opined that Petitioner required no further treatment for any causally related condition, he encouraged a home exercise program, weight reduction, and smoking cessation. He further stated that the occasional use of over-the-counter or non-steroidal anti-inflammatory medication, as well as an orthopedic follow-up visit, could benefit Petitioner. Dr. Gleason also recommended right knee restrictions of no heavy lifting, climbing, high impact, or similar activities. Nevertheless, he stressed that these restrictions were unrelated to the accident. Petitioner testified that after he saw Dr. Gleason, he learned that his surgery had been denied and that Respondent was not going to pay him TTD benefits.

Dr. Gleason also provided an addendum report that was dated August 13, 2019, although his signature on the report was dated September 8, 2019. Dr. Gleason indicated that he had reviewed additional records related to Petitioner's alleged injury on October 3, 2018, but his opinions remained unchanged. He opined that Petitioner at most sustained a soft tissue sprain or temporary exacerbation to his right knee in October 2018 that improved within a two-day period. Dr. Gleason found that Petitioner did not require right knee surgery or additional treatment for any right knee injury sustained on either of the alleged accident dates. He further opined that Petitioner had no permanent disability as a result of either accident. Although he indicated that Petitioner was restricted to light to medium work, Dr. Gleason found that those restrictions were also unrelated to the alleged work accidents.

On September 3, 2019, Dr. Maday reviewed Dr. Gleason's Section 12 report. Dr. Maday disagreed with Dr. Gleason's interpretation of Petitioner's MRI and instead believed that the MRI was consistent with an acute injury. He stated that Petitioner's history also supported there being an acute condition, because Petitioner only became symptomatic after his injury. Dr. Maday continued to recommend surgery and light duty restrictions.

Petitioner last treated with Dr. Maday on October 29, 2019. At that time, Dr. Maday noted that although Petitioner did have a preexisting degenerative condition within his knee, his current symptoms were consistent with meniscal pathology. He continued to recommend surgery, but stated that as they awaited authorization, Petitioner wanted to undergo a trial return to full duty work so that he could remain gainfully employed.

Petitioner testified that he had asked Dr. Maday to release him to full duty work on a trial basis, because he was out of money. Petitioner testified that he never received benefits from Respondent aside from an advance of $4,069 and he had used his savings to support himself and his family for five months before running out of money.

Petitioner further testified that his trial basis of full duty work was not going well. He testified that he was constantly taking aspirin and using IcyHot for his sore knee. Petitioner also wore a heavy brace at work with bars on the side and a hole over the kneecap. Petitioner testified that although he was back to work at allegedly full duty, he did not consider himself to be a full-duty worker. He testified that his crew helped him out, while he did what he could as far as getting nuts and bolts. He also testified that he could move stuff around, but his crew took care of the lifting. Petitioner had been back to work in a full duty capacity since November 1, 2019.

Petitioner's consolidated matters proceeded to a Section 19(b) hearing on November 21, 2019. While going through the issues, the Arbitrator stated that Petitioner had indicated that Section 19(k), 19(l), and 16 penalties were being sought. The Request for Hearing form also marked that Petitioner claimed entitlement to penalties and fees under Sections 19(k), 19(l), and 16; however, Petitioner did not indicate whether he had or had not filed a penalty petition on the Request for Hearing form.

II. CONCLUSIONS OF LAW

Following a careful review of the entire record, the Commission finds that penalties and fees under Sections 19(k), 19(l), and 16 are not warranted. The Arbitrator based his denial of penalties and fees on the record's failure to show that Petitioner had properly filed a penalty petition. However, the arbitration transcript reflects a discussion with the Arbitrator noting that Petitioner was pursuing penalties. Specifically, the Arbitrator inquired about penalties, noting that Petitioner sought Section 19(k), 19(l) and 16 penalties, and asked if this accurately summarized the issues. Both parties' counsel agreed. Moreover, although the Commission recognizes that Petitioner failed to mark whether he had filed a penalty petition on the Request for Hearing form, Petitioner argues in his brief that "[t]he Arbitrator's basis for denial of penalties is incorrect." Thus, the Commission finds that the Arbitrator and parties knew that penalties and fees were at issue at the time of the hearing, and that the issue of penalties is properly before the Commission on review.

On the Request for Hearing form, Petitioner claimed entitlement to penalties and fees under Sections 19(k), 19(l), and 16. Additionally, when reviewing the Request for Hearing form on the record, the Arbitrator reiterated that Petitioner sought penalties and fees. Thus, it was clear to all parties that Petitioner was pursuing penalties and fees as they proceeded to hearing. Moreover, Petitioner attached to its brief three file-stamped penalty petitions dated July 25, 2019, September 10, 2019, and October 25, 2019. As such, the Commission finds there to be sufficient evidence that Petitioner had properly raised the issue of penalties and fees at the hearing.

The Commission must next consider whether Respondent's conduct rose to a vexatious or unreasonable level. In pertinent part, Section 19(l) provides:

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

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Section 19(k) further states:

> 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. When determining whether this subsection (k) shall apply, the Commission shall consider whether an Arbitrator has determined that the claim is not compensable or whether the employer has made payments under Section 8(j). 820 ILCS 305/19(k).

Lastly, Section 16 provides in pertinent part:

> 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 under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier. 820 ILCS 305/16.

Pursuant to these statutory provisions, the Commission first finds that Section 19(l) penalties are not warranted, because the record fails to show if or when Petitioner ever made a written demand for payment of benefits as explicitly required by the Act. The Commission further declines to award Section 19(k) and Section 16 penalties and fees, because Respondent could reasonably base its denial of TTD benefits on Dr. Gleason's medical opinion and the inconsistencies in the treatment records regarding the onset of Petitioner's right knee problems.

Although Respondent did not accommodate Petitioner's light duty restrictions nor pay TTD benefits from June 6, 2019 through October 31, 2019, Dr. Gleason had provided Respondent with a Section 12 report on August 13, 2019 opining that Petitioner's injuries were not causally related to the alleged work accidents. Dr. Gleason further opined in both his original Section 12 report and the addendum that Petitioner's restrictions were unrelated to his work activities.

Thus, as of August 13, 2019, Petitioner had a medical opinion in support of its denial of TTD benefits. Although the Commission has found that Dr. Gleason's opinions were not

persuasive enough to deny Petitioner compensation, the Section 12 reports on their face were thorough and provided medical conclusions based on Petitioner's treatment records and physical examinations. Dr. Gleason's reports were not egregious in a way that would make Respondent's reliance on them unreasonable, vexatious, or in bad faith. Thus, the record does not support an award of penalties or fees after August 13, 2019 based on Respondent's reliance on Dr. Gleason's medical opinions.

As for before August 13, 2019, the Commission notes that Petitioner did not complain of right knee pain at his initial visit to MercyWorks on March 28, 2019 or in his Report of Occupational Injury or Illness signed on March 28, 2019. Instead, Petitioner initially complained of only low back pain, which quickly resolved and required no work restrictions. Petitioner was also able to keep working full duty for some time after the accident without any right knee restrictions. Petitioner's first documented complaint of right knee pain came on April 4, 2019, and even then, Dr. Anderson kept Petitioner on full duty work. The Commission finds that Petitioner's initial delay in reporting his right knee pain provided Respondent with a good faith argument to dispute TTD benefits as to the right knee before August 13, 2019.

For these reasons, the Commission denies penalties and fees under Sections 19(l), 19(k), and 16 of the Act. The Commission modifies the reasoning for the denial of penalties and fees as stated herein but otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated March 25, 2020 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that penalties and fees under Sections 19(l), 19(k), and 16 of the Act are hereby denied.

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to Section 19(f)(2) of the Act. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 25 2021

Deborah L. Simpson

Deborah L. Simpson

Barbara N. Flores

Mario Parker

DLS/met
O: 12/3/20
46

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

21IWCC0033

O'FARRELL, MICHAEL
Employee/Petitioner

Case# **19WC015749**
19WC015750

CITY OF CHICAGO
Employer/Respondent

On 3/25/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.80% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5512 SHANNON LAW FRIM
JACK CANNON
135 S LASALLE ST SUITE 2200
WOODRIDGE, IL 60517

0010 CITY OF CHICAGO LAW DEPT
D TAYLOR CHITTICK
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

MICHAEL O'FARRELL
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **19** WC **15749**

Consolidated cases: **19 WC 15750**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **NOVEMBER 21, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS – 19 WC 15749

On the date of accident, **OCTOBER 5, 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 $**86,492.90**; the average weekly wage was $**1,658.77**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

Respondent shall be given a credit of $**0.0** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

FINDINGS – 19 WC 15750

On the date of accident, **MARCH 27, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**87,930.77**; the average weekly wage was $**1,686.34.**

On the date of accident, Petitioner was **63** years of age, ***married*** with **0** dependent children.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**4,069.85** for other benefits (*PPD advance*), for a total credit of $**4,069.85**. (AX 1).

ORDER – 19 WC 15749 & 19 WC 15750

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law:*

- The Arbitrator finds Petitioner is entitled to reasonable and necessary prospective medical care, including any prescribed post-surgical care, as recommended by Dr. Maday.; and,

- The Arbitrator finds the Respondent shall pay Petitioner temporary total disability benefits of **$1,124.23**/week for **21 weeks**, commencing June 6, 2019 through October 31, 2019, as provided in Section 8(b) of the Act.; and,

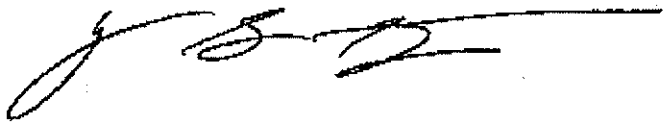
- The Arbitrator, at this time and pursuant to the parties' stipulation on the record, issues no order regarding medical bills. (Tr. at 6).; and,

- The Arbitrator denies Petitioner's claim for penalties and attorney's fees.; and,

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

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

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



Signature of Arbitrator

MARCH 23, 2020
Date

MAR 25 2020

21IWCC0033

MICHAEL O'FARRELL v. CITY OF CHICAGO

19 WC 15749 & 19 WC 15750

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried on Petitioner's 19(b)/8(a) Petition before Arbitrator Steffenson on November 21, 2019. The issues in dispute were causal connection, medical bills, Temporary Total Disability (TTD) benefits, penalties and attorney's fees, and prospective medical care. (Arbitrator's Exhibit 1). The parties agreed to receipt of this Arbitration Decision via e-mail and requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act. (Arbitrator's Exhibit (*hereinafter*, AX) 1).

FINDINGS OF FACT

Petitioner, Michael O'Farrell, has worked as a laborer for Respondent's, City of Chicago, Water Department, since July 2001. (Transcript at 12-13). Since that time, Petitioner's work involved digging ditches and repairing leaks throughout the city. (Transcript (*hereinafter*, Tr.) at 13). Over last 4 years, Petitioner has been working on a hydrant truck, so his job duties included repairing fire hydrants, broken stems, and other equipment that keeps the hydrant functional. (Tr. at 13). To access the inside of the hydrant for certain repairs, the hydrant head must be removed. Petitioner uses a pipe wrench or a magnetic key to loosen and remove the hydrant heads. (Tr. at 14). The hydrant heads weigh 75-100 pounds. (Tr. at 14).

When Petitioner reported to work on **October 5, 2018**, was feeling fine physically, and had no problems with his right knee. (Tr. at 15). Petitioner stated he, "never had a problem with it in my life." (Tr. at 15). While Petitioner underwent *left* knee surgery with Dr. Maday approximately 15 years ago, Petitioner had never undergone any medical treatment for his *right* knee.[1] (Tr. at 15). During work on October 5, 2018, Petitioner and his crew were returning to the yard at 67th and Wood to end the day after they were finished with the day's jobs. (Tr. at 16). Petitioner was riding in a City service truck, positioned in the rear bench seat behind the driver with two co-workers to his right when three (3) gunshots were fired at the truck, with one hitting the front end. (Tr. at 16-17). The two laborers next to Petitioner in the

[1] Petitioner's treating medical records from Respondent's occupational clinic, MercyWorks, referred Petitioner to Dr. Maday in connection with his 2006 left knee injury. (Petitioner's Exhibit 1 at 87).

back seat ducked to their left and collapsed on the outside of Petitioner's right knee, pushing Petitioner against the door. (Tr. at 17).

Petitioner's right knee began to bother him that evening, and the following day, October 6, 2018, he reported to MercyWorks where he was seen by Dr. Edwin Ekong and reported pain in his right knee. (Tr. at 17, Petitioner's Exhibit (*hereinafter*, PX 1 at 41-42). Petitioner reported that when his truck was hit by gunfire, the driver stomped on the brake, causing Petitioner to jerk forward and causing the other passengers to lean toward him as they were ducking for cover, causing pain in his right knee. (PX 1 at 41).

Petitioner was released back to work full duty and missed no time from work. (Tr. at 17-18, PX 1 at 41-42). He had no follow-up medical visits, no physical therapy, and no visits with an orthopedic surgeon. (Tr. at 18, PX 1 at 41). On October 12, 2018 Petitioner reported to MercyWorks by phone that his right knee felt fine and no further treatment was recommended. (PX 1 at 41).

Petitioner was successfully able to perform his full job duties for the next five-plus months, up until **March 27, 2019**. (Tr. at 18). On that date, Petitioner suffered injuries to his lower back and right knee when he was attempting to twist a hydrant head that would not disengage, causing him to twist and fall. (PX 2 at 7, Tr. at 18-20). He was working with another laborer to remove a hydrant head from its stem. (Tr. at 18). He was using a magnetic key to remove the hydrant head after the other laborer removed the nuts and bolts from the hydrant. (Tr. at 18-19). When the hydrant head was loosened from the stem, it remained stuck and could not be removed with the magnetic key. (Tr. at 18-19). The key fell to the ground causing Petitioner to lose his balance and twist backwards. (PX 1 at 32, 33). Petitioner twisted and fell due to the pressure and weight of holding the hydrant head in place. (Tr. at 19-20). Petitioner immediately felt pain in his left lower back, and later that evening had pain in his right knee. (Tr. at 20).

Petitioner reported to Dr. Steven Anderson at MercyWorks the following day, March 28, 2019, and reported his lower back pain. (Tr. at 21, PX 1 at 31). After that, his right knee began to hurt. (Tr. at 21). He returned to MercyWorks on April 4, 2019 with complaints of both lower back pain and right knee pain at a level of 7/10. (Tr. at 21, PX 1 at 5, 30). He reported that he may have twisted the right knee in the accident. (PX 1 at 5). Dr. Anderson noted the presence of an effusion in the right knee and diagnosed Petitioner with a right knee sprain, in addition to a lumbar strain. (PX 1 at 5). Dr. Anderson prescribed pain medication and returned Petitioner to work full duty. (Tr. at 21, PX 1 at 5, 29).

Petitioner returned to MercyWorks again on April 18, 2019 reporting that his back was getting better with pain at 4/10. (Tr. at 21-22, PX 1 at 7, 28). However, his right knee continued

to cause him significant pain. (PX 1 at 7, 28). Petitioner reported to Dr. Anderson that he had seen his primary care physician on April 5, 2019 and was given Naprosyn and Baclofen. (PX 1 at 7). Dr. Anderson noted a positive valgus stress test with MCL tenderness. (PX 1 at 7). He was given home exercise recommendations, a knee brace, and was instructed to apply ice to the knee 3 times per day. (PX 1 at 7). Petitioner was again sent back to work full duty. (Tr. at 21-22, PX 1 at 7, 27).

While his lower back pain was "nearly gone," Petitioner continued to have right knee pain and returned to MercyWorks on May 2, 2019. (Tr. at 22, PX 1 at 7, 26). He reported that he was having persistent right knee pain of 7-8/10 by the end of his workday. (PX 1 at 7). Dr. Anderson again noted an effusion in the right knee, as well as positive valgus and varus stress tests. (PX 1 at 7). Dr. Anderson referred Petitioner for an MRI, which he underwent on May 12, 2019. (Tr. at 22, PX 1 at 7, 25, 9-10).

That MRI revealed a "*large, highly complex radial and oblique tear* of the posterior horn of the medial meniscus extending into the posterior body", with an adjacent large subchondral nondisplaced fracture of the weight-bearing surface of the medial tibial plateau and extensive surrounding marrow edema. (PX 1 at 9-10) (emphasis added). Petitioner returned to MercyWorks on May 16, 2019 still having severe right knee pain, and after a review of his MRI results, was referred to an orthopedic surgeon. (Tr. at 22, PX 1 at 7, 24). Petitioner requested to see Dr. Michael Maday due to his familiarity with him through the left knee surgery Petitioner underwent years prior. (Tr. at 23).

On June 4, 2019, Petitioner saw Dr. Maday and reported that he sustained a twisting injury while working. (PX 2 at 33). Petitioner reported to Dr. Maday that he was bending and lifting fire hydrants and removing bolts, putting new ones on, and changing gaskets. (PX 2 at 33). At the time he was adjusting the fire hydrant he noted increased pain and swelling over the medial aspect of his knee. (PX 2 at 33). Dr. Maday's examination revealed joint line tenderness and a positive McMurray's test. (PX 2 at 33). After his examination and review of the MRI results, Dr. Maday recommended arthroscopic surgery. (PX 2 at 33, Tr. at 23-24). Dr. Maday explained:

> "Since he has had no significant improvement despite medication, self-directed home exercise program, bracing, and the fact that he has full motion and strength, I would recommend arthroscopic surgery to address the meniscal pathology." (PX 2 at 33).

Dr. Maday explained that Petitioner is not a candidate for physical therapy because he has full motion and strength and is not a candidate for a corticosteroid injection because he has no significant degenerative changes on MRI. (PX 2 at 33). Dr. Maday gave Petitioner light duty

work restrictions of no squatting, no kneeling, and no prolonged standing or walking. (PX 2 at 33). Because no light duty was available for Petitioner at the Water Department, Petitioner was off work without benefits as of June 4, 2019. (Tr. at 24).

Thereafter, on August 13, 2019, Petitioner, pursuant to Respondent's Section 12 request, met with Dr. Thomas Gleason for an examination. (Tr. at 24-25, PX 2 at 15-21). He reported to Dr. Gleason that he was working on a fire hydrant using a magnetic key to twist the hydrant head off, but it did not disengage. (PX 2 at 15). The whole weight went off and he followed it, causing him to twist his back. (PX 2 at 15). Petitioner reported pain to the anterior and inner right knee. (PX 2 at 16). Dr. Gleason noted a positive McMurray's test, medial joint line tenderness on palpation of the knee, as well as mild crepitation on examination. (PX 2 at 17).

Dr. Gleason's report was transcribed on August 19, 2019. (PX 2 at 21). Dr. Gleason agreed with light duty work restrictions with respect to heavy lifting, climbing, and impact-type activities. (PX 2 at 19). Dr. Gleason also agreed that Petitioner needed additional orthopedic follow up for consideration of an arthroscopy. (PX 2 at 20). However, Dr. Gleason opined that Petitioner suffered from bilateral degenerative joint disease, symptomatic on the right unrelated to the March 27, 2019 work accident. (PX 2 at 20). Dr. Gleason stated, "a complex tear of the posterior horn extending into the body of the medial meniscus suggests a chronic pre-existing condition." (PX 2 at 20). After Dr. Gleason's examination, Petitioner learned that surgery was not approved, and that TTD would not be paid. (Tr. at 25).

Petitioner returned to Dr. Maday on September 3, 2019. (Tr. at 25, PX 2 at 7-8). Dr. Maday noted that when he last saw Petitioner, he recommended light duty restrictions, but Respondent could not accommodate light duty, so Petitioner has been off work. (PX 2 at 7). Dr. Maday also reviewed Dr. Gleason's report. (PX 2 at 7). With respect to Dr. Gleason's diagnosis of degenerative changes, Dr. Maday noted that there was no mention of degenerative changes on MRI. (PX 2 at 7). Dr. Maday further opined that the MRI is "consistent with an acute injury given the bone bruise present, the effusion present, and the nature of the complex tear." (PX 2 at 7). Dr. Maday stated, "there is no evidence that this meniscal tear was a chronic pre-existing condition." (PX 2 at 7). Dr. Maday also noted that "the history also supports an acute condition since Mr. O'Farrell was asymptomatic prior to March 27th and became symptomatic after the work-related injury." (PX 2 at 7). Dr. Maday summarized his analysis of Dr. Gleason's report:

> "Therefore Dr. Gleason notes that Mr. O'Farrell was asymptomatic prior to this injury, sustained a twisting injury, does have medial joint line tenderness and a positive McMurray's test and is still symptomatic 5 months following his injury and does

> feel that arthroscopic surgery may be necessary to address his symptoms. Therefore, it is unclear why Dr. Gleason felt that Mr. O'Farrell's condition was not related to his March 27th incident either as a direct cause or as an exacerbation of a pre-existing condition." (PX 2 at 8).

Dr. Maday also reiterated his recommendation for surgery:

> "As he had not returned back to his pre-injury status and had not improved despite the use of medications, bracing, passage of time, modification of activities, he does have joint line tenderness as well as a positive McMurray's sign and findings on MRI consistent with a complex tear of the posterior horn of the medial meniscus, it is evidence that Mr. O'Farrell does satisfy all ODG criteria for arthroscopic surgery." (PX 2 at 8).

Dr. Maday continued Petitioner's light duty work restrictions. (Tr. at 25, PX 2 at 8). Dr. Maday anticipated that Petitioner would be able to return to full duty work 2-3 months post-surgery, but without surgery, would remain on light duty indefinitely. (PX 2 at 8).

On October 29, 2019, Petitioner returned to Dr. Maday and asked Dr. Maday to return him back to full duty work on a trial basis. (Tr. at 26). Petitioner explained that he was out of money and was not receiving benefits from the City. (Tr. at 26). Petitioner used his savings to support himself and his family, but the money ran out after about five months. (Tr. at 26). The only benefits he has received from the City was a $4,069.85 advance. (AX 1, Tr. at 26-27). Dr. Maday released Petitioner to return to work full duty on a trial basis, as requested. (Tr. at 27). Petitioner returned to work on November 1, 2019. (Tr. at 31). Petitioner reported that his attempt to return to work is "not going very well." (Tr. at 27). His knee is sore, and he takes aspirins and uses IcyHot "constantly." (Tr. at 27). He wears a heavy brace while at work, and a lighter brace when off work. (Tr. at 27). Petitioner testified that he does not consider what he is doing at work to be back to full duty. (Tr. at 28). Other members of his crew help him out while at work, particularly with lifting and moving things around. (Tr. at 28). "I have a good crew that helped me out," he testified. (Tr. at 31).

21IWCC0033

CONCLUSIONS OF LAW

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

19 WC 15749

Issue F: *Causal connection*

The Arbitrator finds Petitioner's October 5, 2018 then-current condition of ill-being is causally connected to his injury of that date. (PX 1). Petitioner was diagnosed with a "sprained right knee" during an October 5, 2018 examination at MercyWorks and was authorized to return to work by Dr. Ekong at that time. (PX 1 at 41-42). Subsequently, on October 12, during a telephone call with Dr. Anderson, Petitioner reported his right knee to be "fine" and Dr. Anderson closed Petitioner's case at MercyWorks. (PX 1 at 41).

Issue J: *Medical bills*

The parties stipulated the issue of unpaid medical bills was "TBD". (AX 1). They further clarified they "have agreed to postpone litigating the issue of medical bills pending the (A)rbitrator's determination on the other issues." (Tr. at 6). Accordingly, at this time and pursuant to the parties' stipulation, the Arbitrator issues no order regarding medical bills under 19 WC 15749.

Issue K: *Prospective medical care*

Petitioner's medical care relative to his October 5, 2018 accident concluded after his October 12 telephone call with Dr. Anderson. (PX 1 at 41). Accordingly, the Arbitrator does not award prospective medical care under 19 WC 15749.

Issue L: *TTD*

Dr. Ekong promptly returned Petitioner to work after the October 5, 2018 appointment at MercyWorks. Accordingly, the Arbitrator does not award TTD benefits under 19 WC 15749.

Issue M: *Penalties and attorney's fees*

The Arbitrator declines to award penalties or attorney's fees pursuant to Section 19(k), Section 19(l), and Section 16 under 19 WC 15749.

Also, 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, for 19 WC 15749.

19 WC 15750

Issue F: *Causal connection*

To begin, the parties stipulated Petitioner suffered accidental injuries that arose out of and in the course of his employment with Respondent on March 27, 2019. (AX 1). In conjunction with this stipulation, the Arbitrator finds Petitioner's current condition of ill-being is causally related to the March 27, 2019 work accident. The Arbitrator's conclusion is supported by the opinions of Petitioner's treating physician, Dr. Michael Maday, as contained in Petitioner's medical records, and by proof of Petitioner's prior good health with respect to his right knee combined with consistent complaints of right knee pain after his work accident.

First, while a medical opinion is not essential to support the conclusion that an accident caused a claimant's condition of ill-being[2], in this case, Dr. Maday affirmatively and unequivocally opined that Petitioner's right knee injury and need for surgery are related to the twisting injury he suffered at work on March 27, 2019. Moreover, a consistent history of the accident appears in the records of Dr. Anderson at MercyWorks, Dr. Maday, and Respondent's §12 examiner, Dr. Gleason. (PX1 pp. 5, 32-33, PX2 p. 15, 33). Arbitrator also relies on these histories, as well as Petitioner's credible testimony, as factors in finding causal connection exists between Petitioner's current right knee condition and the March 27, 2019 accident.

Additionally, with respect to causation, proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. (*Granite City Steel Co. v. Indus. Comm'n*, 97 Ill.2d 402 (1983), *Land and Lakes Co. v. Indus. Comm'n*, 359 Ill.App.3d 582 (2nd Dist. 2005)). In this case, there is no evidence that Petitioner has ever had any problems with his right knee prior to his October 5, 2018 work accident. That injury resolved quickly, requiring only one visit to MercyWorks with no additional treatment. (PX 1 at 41-42). Petitioner never missed time from work as a result of the injury, and in the over five months between resolution of the October 5, 2018 injury and the March 27, 2019 twisting injury, Petitioner worked full duty with no problems with his right knee. There also is no indication Petitioner had any problems with the right knee or underwent any additional medical treatment for said knee between October 6, 2018 and March 27, 2019.

[2] *Univ. of Ill. v. Indus. Comm'n*, 365 Ill.App.3d 906, 912 (1st Dist. 2006).

Petitioner credibly testified he had never had pain or problems with, or sought medical treatment for, his right knee before October 5, 2018 or between October 6, 2018 and the March 27, 2019 accident. There was no contrary evidence. The only evidence on this point is that Petitioner went nearly 18 years working uninterrupted full duty as a laborer without pain or problems with his right knee until he twisted and fell at work on March 27, 2019, and since that time, Petitioner has had continuous problems with his right knee. Thus, Petitioner's lack of prior complaints combined with consistent complaints of right knee pain after the March 27, 2019 accident also support the Arbitrator's finding of causal connection.

The Arbitrator declines to adopt the Section 12 opinions of Dr. Gleason, and finds the opinions of Petitioner's treating physician, Dr. Maday, to be more credible. As Dr. Maday explained, the MRI revealed no evidence of degenerative changes. The Arbitrator finds persuasive Dr. Maday's explanation that the condition of Petitioner's knee is "consistent with an acute injury given the bone bruise present, the effusion present, and the nature of the complex tear," and that "there is no evidence that this meniscal tear was a chronic pre-existing condition." (PX2 p. 7). The Arbitrator rejects Dr. Gleason's opinions to the contrary as inconsistent with the objective medical evidence, and not credible.

Moreover, even if Dr. Gleason is correct, and Petitioner's current condition is related to an underlying degenerative joint disease, the March 27, 2019 work accident caused, at the very least, a compensable aggravation of a pre-existing condition, as there is no evidence that Petitioner had any symptoms related to any degenerative condition in his right knee before the October 5, 2018 and March 27, 2019 accidents. He certainly did not have a recommendation to undergo surgery on that knee. Accordingly, the overwhelming weight of the credible and objective medical evidence supports a finding of causal connection between the March 27, 2019 work accident and the current condition of Petitioner's right knee.

Issue J: *Medical bills*

The parties stipulated the issue of unpaid medical bills was "TBD". (AX 1). They further clarified they "have agreed to postpone litigating the issue of medical bills pending the (A)rbitrator's determination on the other issues." (Tr. at 6). Accordingly, at this time and pursuant to the parties' stipulation, the Arbitrator issues no order regarding medical bills under 19 WC 15750.

Issue K: *Prospective medical care*

The Arbitrator finds Petitioner is entitled to prospective medical care in the form of arthroscopic surgery as recommended by Dr. Maday. The Arbitrator notes even Dr. Gleason observed Petitioner is not at MMI and agreed that arthroscopic surgery is an appropriate

consideration given the current condition of Petitioner's right knee. (Respondent's Exhibit 1 at 6). Dr. Maday credibly summed up his reasoning behind recommending surgery:

> "As he had not returned back to his pre-injury status and had not improved despite the use of medications, bracing, passage of time, modification of activities, he does have joint line tenderness as well as a positive McMurray's sign and findings on MRI consistent with a complex tear of the posterior horn of the medial meniscus, it is evidence that Mr. O'Farrell does satisfy all ODG criteria for arthroscopic surgery." (PX 2 at 8).

Accordingly, and for the same reasons relied upon for the finding of causal connection above, the Arbitrator finds the opinion of Dr. Maday persuasive, and finds Petitioner is entitled to reasonable and necessary prospective medical care, including any prescribed post-surgical care, as recommended by Dr. Maday.

Issue L: *TTD*

The Arbitrator finds Petitioner is entitled to TTD payments from June 6, 2019 when Dr. Maday provided light duty recommendations which Respondent was unable to accommodate, through October 31, 2019, when Petitioner requested to be released full duty due to financial concerns.

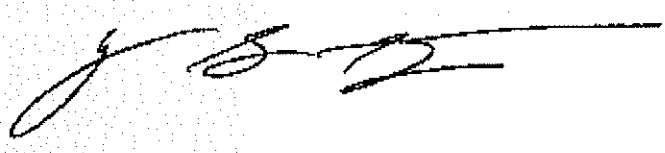
The Arbitrator finds Petitioner is entitled to TTD in the amount of $1,124.23 per week from June 6, 2019 through October 31, 2019, a period of 21 weeks, totaling $23,608.83.

Issue M: *Penalties and attorney's fees*

Petitioner claimed entitlement to penalties under Sections 19(k) and 19(l), as well as attorney's fees under Section 16 of the Act. (AX 1). However, Petitioner failed to indicate on the Request for Hearing (RFH) form whether he "**had or had not**" filed a penalty petition in support of this claim for penalties and attorney's fees. (AX 1) (emphasis added). Furthermore, a review of the actual IWCC files for both 19 WC 15749 and 19 WC 15750 failed to find any **filed** penalty petition and no such penalty petition was admitted into evidence. (Tr. at 36-40, 44). Additionally, Petitioner sought and was granted permission to amend the RFH relative both to the first date of accident and his marital status but took no action to amend the penalties issue of the RFH. (Tr. at 34-36).

As the IWCC files and the record of these proceedings lacks a penalty petition setting forth any allegations entitling Petitioner to penalties under Sections 19(k) and 19(l), as well as attorney's fees under Section 16, the Arbitrator declines to award the same to the Petitioner.

Lastly, and as noted above, 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, under 19 WC 15750.



Signature of Arbitrator

MARCH 23, 2020
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KELLY STORK,

Petitioner,

21IWCC0034

vs.

NO: 19 WC 27240

ADVENTIST BOLINGBROOK HOSPITAL,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof. The Commission 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 (1980).

I. FINDINGS OF FACT

On July 17, 2019, Petitioner, an OB scrub technician, held a patient's leg while assisting with a delivery. In doing so, Petitioner put the bottom of the patient's foot on her shoulder and leaned forward as the patient pushed. Petitioner testified that her arms got tired as the patient's muscles grew stronger from the epidural wearing off. Although Petitioner thereafter finished her shift, she noted low back pain. Petitioner testified that her back was sore and would tighten up when she bent down, but it was common to get aches and pains after helping with a childbirth.

The following morning, as Petitioner was using the bathroom, she then felt her right hip pop and her leg go numb. Nevertheless, Petitioner left for work and took Tylenol for the pain. After her July 17, 2019 accident occurred on a Wednesday, Petitioner continued to work for two days on Thursday and Friday before having five days off. Petitioner testified that she hoped her pain would go away during her days off, but it did not.

On July 24, 2019, Petitioner presented to Nurse Practitioner Noreen Pierandozzi with complaints of right hip pain and back pain radiating down her right lower extremity. NP Pierandozzi diagnosed Petitioner with acute right-sided low back pain with sciatica and right hip joint pain. She then provided an orthopedic referral, prescribed Flexeril and Norco, and took Petitioner off work.

NP Pierandozzi also ordered MRIs, which were obtained on July 27, 2019. The right hip MRI showed severe osteoarthritis with diffuse degenerative labrum tearing. A lumbar spine MRI further revealed right-sided radiculopathy primarily caused by an L4-L5 disc bulge with right disc extrusion and caudal migration causing severe right-sided central canal stenosis, impingement on the right L5 nerve root, and bilateral neural foraminal narrowing. There was also a right disc extrusion with caudal migration at L5-S1 causing severe right-sided central canal stenosis, impingement on the right S1 nerve root, and right-sided neural foraminal narrowing. A thoracic spine MRI was also obtained, revealing minimal degenerative disc disease without stenosis.

When Petitioner returned to NP Pierandozzi on July 31, 2019, she was diagnosed with a right acetabular labrum tear and intervertebral disc protrusions in the lumbosacral and thoracic regions. Petitioner testified that she reported her injuries as being work-related once she received her MRI results from NP Pierandozzi at this visit. Petitioner testified that she did not immediately report her injury, because she thought it would go away; however, she realized the seriousness of the injury after seeing the MRI results.

On August 1, 2019, Petitioner sent an e-mail to Susan Matthews, Respondent's south building director, describing her accident. In her e-mail, Petitioner asked Ms. Matthews to input her injury into Respondent's risk master system, which was where employers were supposed to immediately report any work accidents. Cynthia Wolfer, AMITA Health's workers' compensation specialist, also testified that she learned of Petitioner's accident on August 1, 2019 when Ms. Matthews forwarded her Petitioner's e-mail. Ms. Wolfer then e-mailed Angela Funk, lead processor for medical benefits, to verify that Petitioner was not improperly receiving short-term disability. Petitioner testified that she had applied for short-term disability by mistake, because she thought she was supposed to be on FLMA. On August 2, 2019, Sedgwick Claim Management Services, the company that administered Respondent's short-term disability, wrote a letter indicating that Petitioner had filed for disability benefits on August 1, 2019 but withdrew that request on August 2, 2019. Petitioner never received any short-term disability benefits.

Also on August 1, 2019, a disability report was filled out by Sedgwick Claim Management Services stating that Petitioner had reported an injury that was not work-related. The disability report further indicated that Petitioner's last day worked was July 19, 2019 and her first date of absence was July 25, 2019. Petitioner testified at the hearing that she did not recall telling Sedgwick Claim Management Services that her accident was not work-related.

Thereafter, on August 9, 2019, Petitioner presented to Dr. John Pinnello of Castle Orthopedics. Dr. Pinnello diagnosed Petitioner with right hip joint pain and a herniated lumbar intervertebral disc. He further indicated that Petitioner had degenerative changes in her hip and that Petitioner's hip instability could be due to her labral pathology or arthritis. Dr. Pinnello also

believed that more of Petitioner's symptoms were coming from her lumbar spine. He prescribed a Medrol Dosepak and kept Petitioner off work.

Petitioner next saw Dr. Thomas McGivney, also of Castle Orthopedics, on August 12, 2019. Dr. McGivney opined that Petitioner had a herniated nuclear pulposus at L4-L5 and L5-S1 that was most likely work-related. He referred Petitioner to Dr. Sachin Bansal for pain injections and maintained Petitioner's off-work restrictions.

Petitioner presented to Dr. Bansal on September 16, 2019, at which time Dr. Bansal noted that Petitioner had immediate back pain after her accident followed by numbness and pain in both legs a few days later with 95% of the symptoms on the right. Dr. Bansal diagnosed Petitioner with lumbar radiculopathy and a herniated disc. He also expressed concern that Petitioner's symptoms were consistent with cauda equina. As such, Dr. Bansal opined that injections were not indicated, and instead, Petitioner likely required prompt surgical decompression. Dr. Bansal also continued Petitioner's off-work restrictions. On the same day, September 16, 2019, Dr. McGivney further recommended an open microdiscectomy at L4-L5 and L5-S1 and off-work restrictions. However, Dr. McGivney did not agree that Petitioner had cauda equina syndrome.

Dr. McGivney noted that Petitioner continued to await surgical approval at her return visit on September 23, 2019. At the time of the arbitration hearing, Petitioner was still waiting for the recommended surgery and remained off work.

Petitioner testified that before July 17, 2019, she did not have any preexisting health conditions, nor significant problems, concerning her back or hip. Respondent submitted only one pre-accident treatment record from Rush Copley Medical Center ER on October 19, 2017, in which Petitioner sought treatment for a headache and low back pain. Lumbar X-rays taken at that time showed degenerative disc disease at L2 through L4. Petitioner was then diagnosed with chronic low back pain without sciatica. Despite this prior low back diagnosis, the treatment provided at this visit focused more on Petitioner's headache. No additional treatment records were submitted into evidence to show that Petitioner sought any further pre-accident low back treatment.

This matter proceeded to a Section 19(b) hearing on March 9, 2020. At the hearing, Petitioner offered two Section 12 reports that were obtained by Respondent into evidence; however, Respondent objected on hearsay grounds. In her Decision, the Arbitrator sustained Respondent's objection, but stated that the inadmissibility of the Section 12 reports did not preclude her from inferring that the reports were favorable to Petitioner. The Arbitrator then found that Petitioner sustained a compensable work accident and awarded reasonable and necessary medical services as well as prospective care, including the recommended microdiscectomy, post-surgical rehabilitative care, and any other reasonable expenses related to Petitioner's ongoing back and right hip conditions. Temporary total disability benefits were also awarded from July 19, 2019 through September 12, 2019 and September 16, 2019 through March 9, 2020.

II. CONCLUSIONS OF LAW

Following a careful review of the entire record, the Commission finds that Petitioner's entitlement to temporary total disability benefits began on July 24, 2019 as opposed to July 19,

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2019. The evidence shows that Petitioner worked at her regular job on July 19, 2019. Petitioner testified that she worked for two days after her accident, which includes July 19, 2019. Additionally, the disability report filled out by Sedgwick Claim Management Services listed the last day Petitioner worked as July 19, 2019. Given that Petitioner worked on July 19, 2019, she is not entitled to temporary total disability benefits starting on that date.

Instead, the Commission finds that Petitioner's period of temporary total disability began on July 24, 2019, because that is the date Petitioner first presented for treatment and was taken off work by a medical provider, NP Pierandozzi. Petitioner was thereafter kept off work by her treating doctors for the entire awarded period of temporary total disability benefits. At the time of the hearing, Petitioner remained off work due to her accident. For these reasons, the Commission modifies the period of temporary total disability benefits to begin on July 24, 2019 and thus finds that Petitioner is entitled to temporary total disability benefits from July 24, 2019 through September 12, 2019 and September 16, 2019 through March 9, 2020.

Furthermore, the Commission strikes the Arbitrator's adverse inference that the inadmissible Section 12 reports would have been favorable to Petitioner. The physicians retained pursuant to Section 12 of the Illinois Workers' Compensation Act are not in the exclusive control of either Petitioner or Respondent, and therefore, an adverse inference should not be made. Nevertheless, in all other aspects not stated herein, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated April 30, 2020 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $510.76 per week from July 24, 2019 through September 12, 2019 and September 16, 2019 through March 9, 2020, which represents a period of 32 3/7 weeks, in accordance with Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the adverse inference that the inadmissible Section 12 reports were favorable to Petitioner is stricken.

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

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

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

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,000.00. 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 the Circuit Court.

DATED: JAN 2 5 2021

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/met
O: 12/17/20
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0034

STORY, KELLY
Employee/Petitioner

Case# **19WC027240**

ADVENTIST BOLINGBROOK HOSPITAL
Employer/Respondent

On 4/30/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0222 GWC INJURY LAWYERS LLC
CASSANDRA SHASHATY
ONE E WACKER DR 38TH FL
CHICAGO, IL 60601

0000 STONE & JOHNSON CHTD
PATRICK DUFFY
111 W WASHINGTON ST SUITE 1800
CHICAGO, IL 60602

21IWCC0034

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kelly Stork
Employee/Petitioner

v.

Adventist Bolingbrook Hospital
Employer/Respondent

Case # **19** WC **27240**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **New Lenox**, on **3/9/2020**. 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. [x] 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. [ ] 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. [x] Other **PROSPECTIVE MEDICAL**

FINDINGS

On **7/17/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**39,839.19**; the average weekly wage was $**766.14**.

On the date of accident, Petitioner was **59** 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 $**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

1) Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$890.00** to Rush Copley Medical Center (Nancy Pieradozzi, APN); **$5017.55** to Rush Copley Medical Center (Imaging Reports), and **$1,330.00** to Rush Castle Orthopaedics, as provided in Sections 8(a) and 8.2 of the Act.

2) Respondent shall pay to Petitioner TTD benefits of $510.76/week commencing: **July 19, 2019 through September 12, 2019** and **September 16, 2019 through March 9, 2020** as provided by Section 8(b) of the Act.

3) Respondent is liable for Petitioner's prospective surgery, pursuant to the recommendations of Dr. McGivney, namely an open microdiscectomy at L4-5 and L5-S1, and any related post-surgical rehabilitative care.

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

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

Jason A. Mgatt

Signature of Arbitrator

4-27-2020
Date.

ICArbDec p. 2

APR 30 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION

KELLY STORK,	)	
	)	
Petitioner,	)	
	)	
v.	)	**19 WC 27240**
	)	
ADVENTIST BOLINGBROOK HOSPITAL,	)	
	)	
Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

This matter proceeded to hearing pursuant to Section 19(b) of the Act on March 9, 2020 in New Lenox, Illinois (Arb. 1). The disputed issues are: accident, causal connection, unpaid medical bills, TTD, and prospective medical care (Id.).

Kelly Stork ("Petitioner") was employed by Adventist Bolingbrook Hospital ("Respondent") on July 17, 2019 as an Obstetrics Technician and had been so employed for the prior 12 years. On this date, she alleges she injury to her back and right hip while performing her normal job duties which required her to assist doctors in childbirth.

Petitioner assisted in approximately 1-2 childbirths per day, each birth taking anywhere from 6 hours to two days to complete. Her assistance was "hands on", including the difficult task of holding back the legs of the female patient giving birth, a 2-person task, with each person holding one of the patients legs.

It is was not unusual to leave work feeling sore or in pain after helping with a difficult childbirth, according to her testimony. At such times, Petitioner would take over-the-counter pain reliever and soak in her bathtub. The pain and soreness from her shift would soon subside.

Before her alleged work accident, Petitioner did not have any pre-existing back conditions, according to her testimony and when she reported for work on July 17, 2019 she felt fine and was not experiencing any physical ailments.

Regarding her alleged accident, Petitioner testified that on July 17, 2019 she was helping with a particularly difficult childbirth. The patient's epidural had worn off, causing the patient's legs to become stronger and Petitioner's task of holding the patient's leg more cumbersome. Petitioner

placed the bottom of the patients foot on the front of Petitioner's shoulder. Petitioner then leaned forward with her own body weight as the patient continued in her labor. Petitioner testified this was a physically strenuous maneuver and at the end of her shift she felt pain in her lumbar back. Petitioner took a few ibuprofen tablets and clocked out at 7 am on July 18, 2019.

At home following her shift, Petitioner took a bath. While in the bathroom, Petitioner reached for something when her right hip "popped". She felt pain in her right hip and took some Tylenol. Petitioner worked the next two days (July 18 and July 19), although the pain from the date of accident had not subsided and she considered that unusual. Petitioner called her doctor's office and scheduled the earliest available appointment which was not until July 24 with Nurse Practitioner Noreen Pierandozzi.

Petitioner testified that on July 24, 2019 she went to her doctor's office where she complained of radiating back pain and popping in her right hip. She rated her pain at a 10/10. Petitioner reported being sleep deprived due to her pain and was tearful during her exam. It was recommended that Petitioner undergo MRI's of her lumbar back, right hip and thoracic spine and off-work restrictions were instituted for the next 7 days.

Petitioner testified she underwent the MRI's on July 27, 2019. She followed up at her doctor's office three days later with complaints of persistent right hip popping and right leg tingling. Petitioner learned her MRI results revealed a labral tear and lumbar disc protrusions. Petitioner's off-work restrictions were continued and an orthopedic consult was ordered.

Petitioner testified she is aware of Respondent's policy for reporting work injuries which requires employees to create a "risk-master" entry at the time they clock out of their shift. The risk-master entry notifies Respondent, and their workers' compensation coordinator, that a work-injury occurred. Petitioner testified she did not create a risk-master in the days after her accident because, although she was sore and in pain, she thought it would pass and hoped that Flexeril would help. After learning of her MRI results, she tried reporting her injury by creating a risk-master entry on her home computer but was unable to do so. Instead, Petitioner reported her work-injury to the Respondent on August 1, 2019 via email to Susan Matthews, an employee of Respondent who had assisted Petitioner in the past with the risk master system. (Px. 1; Rx. 7). Ms. Matthews then forwarded Petitioner's email to Cynthia Wolfer, the Respondent's workers' compensation coordinator. (Id.).

In the August 1, 2019 email, Petitioner explained the following to Respondent: That it is not unusual for her to leave work feeling sore or in pain, which is why she did not create the risk-master at the end of her shift on the date of accident; The mechanism of injury as holding and pushing back a mother's leg while in labor; Although her pain persisted, Petitioner worked the next two days after her date of accident; She tried creating a risk-master at home, but kept getting an online error stating the page she needed could not be accessed. (Id.).

Petitioner ended her email noting that since she could not report her injury online through risk-master, she opened a short-term disability claim because she did not know how else to proceed. (Id.).

Petitioner withdrew her short term disability claim the next day, on August 2, 2019. (Rx. 4). Petitioner did not receive any benefits from a short term disability policy. (Px. 1). Petitioner testified she thought she was applying for FMLA, not short term disability.

Petitioner testified she completed a Sedgwick Disability report over the telephone on August 1, 2019. The disability report states that Petitioner's injury is not work related. (Rx. 5). When asked about this disability report on cross-examination, Petitioner testified she does not recall telling anyone that her injuries were not work-related, and she does not know why her disability report would say that. Petitioner further testified that before the hearing, she had not seen this disability report before.

Medical records

The records indicate that Petitioner first sought treatment following her alleged accident on July 24, 2019 at Rush-Copley Family Medicine in Aurora, IL. Nurse Practitioner (APN) Pierandozzi noted her complaints of mid to low, constant, back pain radiating down Petitioner's right lower extremity along with right hip pain characterized by popping "every time she moves". (Px. 3). Petitioner had not been sleeping due to pain and was tearful during this encounter. (Id.). Petitioner reported a history of working in obstetrics and holding a patient's legs who had an epidural 7 days ago. Petitioner noted her pain has not improved at all and had increasingly become worse (Id.). Petitioner reported "this has happened before" and it usually goes away. APN Pierandozzi ordered MRI's of Petitioner's lumbar spine, thoracic spine, and right hip and advised her to follow up in one to two weeks. (Id.). Petitioner was restricted from work until July 31, 2019. (Id.).

On July 27, 2019 MRI of Petitioner's lumbar spine noted a disc bulge at L4-L5 with superimposed right paracentral disc extrusion and a 1 cm caudal migration causing severe right-sided central spinal canal stenosis. Impingement on the right L5 nerve root and bilateral neural foraminal narrowing was also noted. The right paracentral disc extrusion with 1 cm caudal migration at L5-S1 was causing severe right-sided central spinal canal stenosis, impingement upon right S1 nerve root and moderate to severe right sided neural foraminal narrowing. (Id.). MRI of Petitioner's right hip noted severe osteoarthritis with diffuse degenerative tearing of the labrum while MRI of her thoracic spine revealed minimal degenerative disc disease. (Px. 4).

On July 31, 2019 APN Pierandozzi noted Petitioner's persistent complaints of mid-lower back pain radiating down her right leg and right hip pain that pops every time she moves. Petitioner rated her pain at a 10/10. (Id). The MRI results were reviewed and Petitioner was diagnosed with a right labral tear and lumbar disc bulging. (Id.). Petitioner was restricted from work and instructed to follow up with an orthopedic physician.

On August 6, 2019 Petitioner presented to Rush Castle Orthopedics where Dr. John Pinnello noted complaints of back and hip pain for the past 2 weeks following an incident at work on July 17 where Petitioner was pulling a patients legs who was in labor. (Px. 5). Petitioner complained of numbness and tingling down her right leg and increased pain with activity and weight bearing. (Id.). Dr. Pinnello reviewed Petitioner's MRI's noting Petitioner had arthritis and labral pathology in her right hip and a right-sided disc extrusion at L4-L5 and L5-S1. Dr. Pinnello noted Petitioner should be off work and instructed her to follow up with Dr. McGivney. (Id.).

On August 12, 2019 Dr. Thomas McGivney noted Petitioner's history of working as an OB technician and helping with a long epidural delivery when Petitioner started experiencing back and right hip pain. (Id.). On exam, the doctor noted lumbar spine tenderness and a right positive straight leg raise test. (Id.). Dr. McGivney diagnosed a herniated nucleus pulpous at L4-L5, L5-S1 that was work-related. (Id.). Petitioner was referred to Dr. Sachin Bansal for pain injections, issued off work restrictions, and prescribed a Medrol Dosepak. (Id.).

On September 16, 2019 Petitioner presented to Rush Castle Orthopedics where Dr. Sachin Bansal noted a history of Petitioner assisting with a July labor delivery when she had to support a heavy leg on her shoulder for several hours, after which, she felt back and right leg pain. Petitioner stated the weakness and numbness in her right leg has increased to the point where she has been losing her footing. (Id.). Dr. Bansal further noted that Petitioner presented with bowel incontinence. (Id.). Dr. Bansal noted, considering Petitioner's recent bowel issue, coupled with the fact that Petitioner's herniation is greater at L5-S1 than L4-L5, he believed Petitioner was suffering from cauda equine. (Id.). Dr. Bansal stated because of this, the injection that Dr. McGivney suggested, would be inappropriate. (Id.). Instead, Dr. Bansal recommended that Petitioner follow up with Dr. McGivney immediately, because she will likely require surgical decompression sooner rather than later. (Id.). Dr. Bansal stated Petitioner was to remain off work until further notice. (Id.).

Later the same day, Petitioner followed up with Dr. McGivney who noted Petitioner had worsening numbness and right leg pain and that for the last two weeks she had intermittent bowel control issues. (Px. 5). Dr. McGivney disagreed with Dr. Bansal's diagnosis of cauda equine, but stated that these symptoms were unusual, and because of them and her worsening symptoms, he wanted to proceed with surgery as soon as possible. (Id.). Dr. McGivney recommended Petitioner undergo an open microdiscectomy at L4-5 and L5-S1 right. (Id.).

Petitioner testified she is waiting for the surgery to be approved.

CONCLUSIONS OF LAW

The Arbitrator incorporates the above findings of fact herein by reference.

ADMISSABILITY OF RESPONDENT'S SECTION 12 REPORTS

Respondent procured examinations under Section 12 of the Act from two orthopedic surgeons, Dr. Shane Nho, who examined Petitioner on September 6, 2019, and Dr. Kern Singh, who examined Petitioner on September 9, 2019. Petitioner's attorney offered Exhibit 6 into evidence which includes the two Section 12 examination reports authored by the above-mentioned physicians. The Respondent objected on the basis of hearsay. Petitioner argued the statements made by the doctors should be admitted pursuant to Rule 801(d) and/or rule 803(4) of the Illinois Rules of Evidence ("IRE").

IRE 801(d) allows such exception for statements that are admissions against Respondent's interest and IRE 803(4) allows for statements made in the course of medical diagnosis or treatment. Neither exception applies in this case. In *Taylor v. Kohli 162 Ill.2d 91, 96*, 204 Ill.Dec.766, 642 N.E.2d 467 (1994), our supreme court held that, as a matter of law, an expert witness is not, per se, an agent of the party who hired him or her and, therefore, the expert's statements and opinions are not admissible against that party's interest. Illinois courts have since applied the holding in *Taylor* to the reports of IME physicians in workers' compensation cases. *Greaney v. Industrial Commission, 832 N.E.2d 331 (1st Dist. 2005)*. Accordingly, the Arbitrator finds that Dr. Singh and Dr. Nho were not agents of the Respondent and, therefore, their reports do not constitute admissions against the interest of Respondent. Likewise, Illinois Rule of Evidence 803(4), does not apply to these records because 803(4) excludes statements made solely for the purpose of preparing for litigation or

obtaining testimony for trial. These physicians conducted their examinations and rendered opinions at the behest of Respondent. They were not assisting Petitioner in the care and treatment of her injuries.

The Petitioner does not advance any other exception to the hearsay rule under which these IME reports could be admitted. Respondent's objection is sustained. Petitioner's Exhibit 6 is not admitted into the record and will not be considered by the Arbitrator.

The Arbitrator notes the inadmissibility of Respondent's IME reports does not preclude her from inferring that the IME reports were favorable to the Petitioner.

ACCIDENT & CAUSATION

Petitioner has met her burden of proof by a preponderance of the credible evidence that an injury occurred on July 17, 2019 that arose out of and in the course of her employment with Respondent.

The Arbitrator found Petitioner to be a credible witness who presented at the hearing as sincere and honest. She testified in a confident manner and withstood a rigorous cross-examination unscathed. Petitioner's testimony regarding her accident history and complaints is corroborated in her treating medical records and other documentary evidence contained in the record.

Most, if not all, of Petitioner's testimony is uncontradicted. On July 17, 2019 Petitioner had worked for Respondent as an Obstetrics Technician and had been so employed for the 12 years prior. When she arrived at work that day, she felt fine. She was not treating or taking medications for back or right hip pain. Petitioner's job duties required her to work in a "hands-on" manner and physically hold women's legs to help them deliver their babies. On July 17, 2019 Petitioner assisted with a particularly difficult childbirth. The patient had earlier received an epidural. Petitioner explained that a patients leg, when influenced by an epidural, was "dead weight". As the epidural wears off, the patient becomes stronger and, in turn, the task of holding the patients leg becomes more difficult. Prior to Petitioner's accident, she had to support a heavy leg on her shoulder for several hours. Petitioner went as far as to place the mother's foot on her shoulder so that Petitioner could lean in with her own body weight to push the mother's leg back. Petitioner testified she has done this before to help mothers deliver their babies and that this maneuver was necessary for the safe delivery of the baby in question. Petitioner's shift ended at 7 am on July 18, 2019. She testified that her low back was sore her shift that day. Because it was not uncommon for Petitioner to experience soreness after helping with a difficult childbirth, she thought the pain would abate after taking ibuprofen and a bath but, while in her bathroom, as she reached for something, she felt her left hip "pop". She worked the next two days with persistent low back and right hip pain and scheduled treatment for the first available date.

In all of Petitioner's medical records she describes an identical mechanism of injury that occurred on July 17, 2019 while at work for the Respondent. The Arbitrator finds Petitioner and her testimony credible and consistent with statements documented in her medical records.

Regarding the Respondent's Exhibit 5 (RX5), the Arbitrator places little to no weight on this exhibit. RX5 is a 3-page document entitled "Disability Report" that purports to document a telephone conversation initiated by Petitioner to Sedgwick on August 1, 2019 at 4:24 pm. On the first page under "Disability Information" it says "Is this work related? NO" (Id). When confronted with this

issue on cross exam, Petitioner was not in any way flustered or bothered by this line of questioning. Petitioner testified she initiated a Sedgwick Disability claim over the telephone on August 1, 2019 after an unsuccessful attempt at creating a risk-master entry on her own computer. She testified she did not recall telling anyone, while on the phone, that her injuries were not work-related, and she does not know why the report would say that. Petitioner further testified that before the arbitration hearing, she had never seen this disability report before. After reviewing RX5, the Arbitrator notes the document contains rudimentary personal information about the Petitioner, where she works, who her physician is, etc. It is not a transcript of a phone call, nor is it a signed statement by Petitioner. It is a 3-page, simplistic, form (similar to a generic "intake" form designed to obtain general information about an individual and initiate or "get the ball rolling" on a more complex process). It is not clear that Petitioner was specifically asked about the etiology of her injuries or if it was assumed by the preparer of the report that Petitioner's injuries were not work related (given that Petitioner was applying for disability benefits as opposed to worker's compensation). Further, it does not make sense that Petitioner would tell the person at Sedgwick that her injuries were not work-related and then a hour-and-a-half later write an email to Susan Matthews providing a very detailed account of her work-related accident and mechanism of injury. (Px. 1; Rx. 7). The Arbitrator notes that when Petitioner made this telephone call she had already sought medical treatment where she provided a history of her work-related accident consistent with her testimony at the hearing. Petitioner consistently reported her accident, mechanism of injury, and symptoms in every encounter with her medical providers that are contained in the record. RX5 is found not to be relevant in the manner Respondent suggests.

Likewise, RX3, an emergency room record dated October 19, 2017, is assigned little to no weight as it documents an October 19, 2017 emergency room visit where Petitioner's chief complaint was a headache causing dizziness. Within an "additional information" section of the emergency room record, it is noted that Petitioner experienced lower back pain for the past three days, but does not reference any injury. (Rx. 3). Petitioner underwent an x-ray that revealed mild degenerative disc disease. (Id.). No lumbar spine MRI order or MRI report is contained within the exhibit. Petitioner was diagnosed with acute low back pain without sciatica and episodic headaches. (Id.). Petitioner was instructed to take Fioricet with Codeine as needed for headaches, and received no treatment recommendation for her back. (Id.).

Petitioner's medical records document consistent descriptions of her accident and all records relate her diagnoses to her described mechanism of injury that occurred at work.

Petitioner's back and hip symptoms following her July 17, 2019 work accident were sole reason she sought medical treatment with APN Pierandozzi on July 24, 2019, and the only reason that necessitated follow up appointments with orthopedists, Dr. Pinnello and Dr. McGivney, and pain management with Dr. Bansal. Diagnostic MRI's performed 10 days following the accident showed a disc bulge at L4-L5 with superimposed right paracentral disc extrusion with 1 cm caudal migration causing severe right-sided central spinal canal stenosis. Impingement upon right L5 -S1 nerve root and moderate to severe right sided neural foraminal narrowing was noted. MRI of right hip noted severe osteoarthritis with diffuse degenerative tearing of the labrum.

Petitioner's medical providers opined in their medical records regarding a causal relationship between Petitioner's work injury on July 17, 2019 and her current state of ill-being. The Arbitrator infers that the opinions of Respondent's IME physicians were favorable to Petitioner on this issue.

Petitioner worked for Respondent, in physically strenuous job for 12 years before this accident. On the accident date she was working full-time and not under the care of any physician regarding her back or right hip nor were any surgical recommendations pending pertaining to those body parts.

The Respondent has offered no alternate means of causation for Petitioner's back or right hip injuries.

The preponderance of the evidence, taken as a whole, establishes that Petitioner's work-related accident on July 17, 2019 is causally connected to her current condition of ill-being in her back and her right hip.

MEDICAL BILLS

Petitioner has met her burden of proof by a preponderance of credible evidence that the medical services provided were reasonable and necessary. Regarding the payment for reasonable medical treatment, the Arbitrator finds that the Respondent has not paid for any medical treatment. The bills introduced by the Petitioner show unpaid medical treatment in the following accounts:

4)	Rush Copley Medical Center: Nancy Pieradozzi, APN	$890.00
5)	Rush Copley Medical Center Imaging Reports	$5,017.55
6)	Rush Castle Orthopaedics John Pinello, MD Thomas McGivney, MD Sachin Bansal, MD	$1,330.00

Respondent has not paid all appropriate charges. As such, the Arbitrator orders the Respondent issue payment to the above providers pursuant to the fee schedule.

TEMPORARY TOTAL DISABILITY BENEFITS

The Arbitrator finds that the Respondent has not issued any temporary total disability (TTD) benefits to the Petitioner related to her July 17, 2019 date of accident. Petitioner has proven by the preponderance of the credible evidence that she is owed temporary total disability benefits from July 19, 2019 through September 12, 2019 and from September 16, 2019 through the date of this hearing March 9, 2020. Petitioner was placed in an "off-work" status by Ms. Pierandozzi, Dr. Pinnello, Dr. McGivney, and Dr. Bansal. Petitioner's off-work status was corroborated by the complaints of pain she demonstrated in each of her doctor's visits.

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of $510.76/week commencing July 19, 2019 through September 12, 2019 and September 16, 2019 through March 9, 2020, as provided by Section 8(b) of the Act.

PROSPECTIVE MEDICAL CARE

The Arbitrator finds that Dr. McGivney's surgical order for a microdiscectomy and postsurgical rehabilitative care is causally necessitated by Petitioner's work-injury that occurred on July 17, 2019. Petitioner's treating orthopedist and spine specialist, Dr. McGivney, has stated in his medical records that Petitioner sustained a work-related back injury, specifically herniated nucleus pulposus at L4-L5 and L5-S1 right. He suggested a reasonable course of treatment and recommended Petitioner have an injection before proceeding with surgery. However, Petitioner's pain management specialist refused to do the injection due to Petitioner's unusual gastrointestinal issues and suggested Petitioner have surgery immediately. Dr. McGivney concurred, and ordered a microdiscectomy and rehabilitative care.

With regard to Petitioner's hip injury, after her initial visit with Dr. Pinnello, treatment for her hip was placed on hold as her lumbar spine injury has taken precedence. As such, the Arbitrator awards reasonable and necessary medical treatment for Petitioner's right hip injury as deemed necessary after she undergoes her microdiscectomy.

As such, the Arbitrator orders the Respondent to pay for Petitioner's microdiscectomy, postsurgical rehabilitative care, and any other reasonable medical expenses related to Petitioner's back or right hip conditions.

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

David Corona,

Petitioner,

vs. No. 16 WC 004847

Elite Staffing,

21IWCC0035

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 19, 2019 is hereby affirmed and adopted.

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

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

21IWCC0035

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,900.00. 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: JAN 26 2021
o-1/7/20
MP/dak
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

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

CORONA, DAVID
Employee/Petitioner

Case# **16WC004847**

21IWCC0035

ELITE STAFFING
Employer/Respondent

On 2/19/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

6020 GOLDBERG SEGALLA LLC
BRITTANY K ANDERSON
311 S WACKER DR SUITE 2450
CHICAGO, IL 60606

21IWCC0035

STATE OF ILLINOIS)

)SS.

COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Corona
Employee/Petitioner

v.

Elite Staffing
Employer/Respondent

Case # **16 WC 004847**

Consolidated cases

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **October 22, 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: Prospective Medical

FINDINGS

On **February 1, 2016** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident. Petitioner did sustain soft tissue sprains and strains to his cervical spine, his lumbar spine, and both knees, all of which when Petitioner reached MMI July 1, 2016.

Petitioner average weekly wage was **$330.00**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of **$5,909.02** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,909.02**.

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

ORDER

Excepting for charges for Protonix, tramadol, topical pain creams, Colace, Fexmid, TENS unit, moist heat unit, lumbar orthosis, and chiropractic therapy through May 27, 2016 (12 weeks), Respondent shall pay reasonable and necessary medical services provided up to July 1, 2016, as provided by §8(a) of the Act and to be adjusted in accord with the medical fee schedule as provided in §8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$319.00/week** for **21 & 3/7 weeks**, commencing **February 2, 2016 through July 1, 2016**, as provided in §8(b) of the Act.

Petitioner's claim for recommended prospective medical care is denied.

Petitioner's Petition for Fees and Penalties pursuant to §16, §19(k), and §19(l) is denied.

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

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

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

Signature of Arbitrator

February 15, 2019
Date

FEB 19 2019

David Corona v. Elite Staffing
16 WC 4847

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?; ***K:*** Is Petitioner entitled to prospective medical care?; ***L:*** What temporary benefits are in dispute? TTD; ***M:*** Should penalties be imposed upon Respondent?

Petitioner testified with a Spanish language translator.

FINDINGS OF FACT

Petitioner David Corona was born in Mexico. He completed the 6th grade at the age of 15 because he repeated numerous years in school due to speech problems. Petitioner testified that as an adult he continues to have problems with his speech. This further affects his comprehension capabilities. In September 1987, at the age of 16, Petitioner moved to the United States. He lives in Kankakee, Illinois.

Petitioner's first job was at Paloma Restaurant, where he worked for approximately 12 years as a dishwasher and occasionally busing tables. He then worked for the next 12 years at Oven Press, where his job duties included cleaning the machines and sweeping the warehouse. He then began working for various staffing companies cleaning offices buildings.

Petitioner did have a prior work injury but did not file any type of Workers' Compensation claim. While at Oven Press, a coworker accidently spilled cleaning acid on his shin. He was taken to the hospital where his wound was cleaned. He returned to work within a few days.

Petitioner testified that he was in good health before his accident. He never had any pain or any prior injuries or received any medical treatment to his head, neck, lower back, or either of his upper legs or knees. He further testified he was able to perform his daily activities and laborious work requirements without any difficulties or pain, prior to his accident. He admitted that he had diabetes and high cholesterol. He did not regularly see a doctor.

Petitioner began working for Respondent Elite Staffing approximately 1 ½ years before his accident. He worked for River Valley Auto Parts, a car engine recycling facility. Petitioner's job consisted of dismantling car engines and their parts. He explained that the motors and parts were held in large containers measuring 4 feet wide by 5 feet high. His job was to take the engine parts out of the large container and then place them on a table which was approximately 5-10 feet away. He would then use the table to break down the parts of the motor. The separated parts were then carried to 15-20 different separating bins, each of which housed various parts and materials. The bins were spread throughout the work area, ranging 15-40 feet from the separating table. Petitioner testified that the size and weight of the parts varied greatly. He would have to lift large engines that weighed 200-300 pounds, as well has handfuls of screws weighing less than one pound. Petitioner further explained that throughout his 8-hour shift he routinely lifted items weighing between 50-150 pounds.

On February 1, 2016, Petitioner was injured when an engine he was carrying slipped from his grasp and struck his upper legs and knees, causing him to fall to the ground onto his back with the motor crashing on top of him. Petitioner had picked the engine in order to disassemble it. The engine weighed about 200 pounds. Petitioner demonstrated how he picked up the motor, what happened as he lost his grip, showing the part of the legs onto which the motor initially fell, and the position he was in as he tried to hold on to the motor prior to falling backwards.

Petitioner testified he bent down to pick up the motor, bending his knees into a squat with his chest forward, buttocks out, and low to the ground. As he lifted the motor, Petitioner first straightening his back to an upright position and then thrust his hips forward in order to create momentum to lift the heavy motor. As he was lifting the motor, he got it above knee level, but before he was able to completely straighten, it began to slip. Petitioner explained that as the motor slipped it struck right above the knees because as it slipped, he went back into a squatting position in an attempt to keep the motor from falling.

Petitioner testified that he attempted to regain control of the motor, but the motor was pushing his legs forward while he was already falling backwards. Petitioner fell backwards, striking his head on the floor with such force that his safety glasses and helmet flew off and that he lost consciousness. He is not certain what happened next. Petitioner explained that once he regained consciousness everything seemed "cloudy." Two coworkers and a manager helped him up and told him how they found him.

Petitioner testified that after the accident his entire body felt hot and inflamed. He felt immediate pain the knees, the top and back of his head, neck, lower back, and chest. He had significant pain in his knees. Petitioner touched just above the kneecap to just below the knee to demonstrate where his pain was. Petitioner further testified that he

also developed bruises on his legs from the mid-thigh extending to the area where the knee bends, left greater than right.

Petitioner was sent to Physicians Immediate Care [PIC], PX #1). He gave a history of a work accident in which an engine fell on his legs and pushed him back. He hit his back and head on the ground. He complained of back pain but denied loss of consciousness. A pain diagram was marked on the back of the head, the entire spine, both knees and both thighs. Due to the severity of his symptoms, Petitioner was transported by ambulance to Presence St. Mary's Hospital in Kankakee, Illinois [St. Mary's] (PX #2).

Petitioner testified that at St. Mary's that he reported pain in his head, back, chest, abdomen, and both knees and legs. Petitioner gave a history that he was trying to lift a 400-pound engine when the engine started falling, striking his legs and pushing him backwards. He fell forcefully onto the floor, landing on his back and striking his occiput. Petitioner's complaints of headache, vertebral pain, chest pain, shortness of breath and leg pain were noted. He denied radicular pain in the arms and legs. It was not noted whether he reported a loss of consciousness. The physical examination elicited back and neck pain. There was good range of motion at both hips and knees. He was neurologically intact. CT scans of the pelvis and abdomen, head, chest, and cervical spine were negative for abnormalities, as well as plain X-rays. At one point Petitioner was observed sleeping. Petitioner was discharged with diagnoses of blunt head trauma, concussion, and fall and a recommendation to follow up with Dr. Bruce Dodt.

Petitioner testified that because of severe head pain, nausea, and vomiting, he returned to St. Mary's February 3, 2016. PX #1 shows that Petitioner also returned to PIC on February 3. PX #1 records note that Petitioner returned for a check on his back pain. He complained of headache, back pain, pain in both knees and quadriceps on getting up from sitting. Petitioner was diagnosed with concussion without loss of consciousness, contusion of right thigh, contusion of left thigh, and dorsalgia.

Petitioner did return to St. Mary's on February 3 with a chief complaint of persistent 4/10 headaches (PX #2). There were no documented complaints of vomiting or nausea. The physical exam was negative for joint pain or neck pain, but the chest and back were diffusely tender. There were no headache or back pain "red flags." There was full range of motion without pain numbness or tingling or weakness associated with the neck. On examination of the back there was a negative crossover and negative straight-leg raise. Imaging, including a repeat CT scan of the head, was a negative for abnormalities. He was given IV morphine for pain. It was noted that Petitioner's symptoms were consistent with concussion/post concussive syndrome and musculoskeletal pain, but the discharge diagnoses were concussion, back pain, and headache. He was given prescriptions for 600 mg ibuprofen and 10 mg Flexeril and was advised to follow up at Aunt Martha's Health Center.

Petitioner then testified that "legal people" arranged his further medical care

Petitioner testified that for the first few weeks after the accident he had significant inflammation and swelling in his knees. He testified that in the months following the accident activities like sitting and standing for longer periods, walking, climbing and descending stairs, and going to and from a sitting position all caused significant pain. He rated the pain in his knees at 7-8/10 and explained that with medications it would go down to a 5-6/10. Petitioner also testified that he sometimes had problems walking and would walk with a limp.

Petitioner consulted with orthopedic surgeon Dr. Ronald Silver February 5, 2016 (PX #3). Petitioner gave a history that on February 1 he attempted to lift a heavy motor but could no longer carry it and fell backward onto the ground. The motor crashed onto the anterior part of his legs in a crushing-type mechanism. Petitioner reported that before this accident was normal, without previous medical care or symptoms. He had been working full time without restrictions. On examination Dr. Silver noted patellofemoral crepitation bilaterally with peripatellar tenderness and effusions. There was medial joint line tenderness bilaterally with questionable McMurray's tests. Petitioner's ligaments were stable but motion was painful beyond 90°. Dr. Silver obtained standing AP, lateral, and skyline X-rays showed minimal bilateral spurring of the patellofemoral articulations.

Dr. Silver noted concern about cartilage damage of both knees. He recommended physical therapy and MRIs. He noted Petitioner was temporarily disabled. He prescribed a topical anti-inflammatory for soft tissue swelling and inflammation and pain control. He also prescribed meloxicam (Mobic), Protonix, hydrocodone (90), and Ultram (tramadol). Dr. Silver referred Petitioner to a spinal pain specialist for his spine and head injuries.

Dr. Silver also ordered a toxicology screening without entering a corresponding chart note. The sample was collected February 5 and was positive for tramadol only.

On February 11, 2016 Petitioner signed a Problem List on which he noted that he had no "problems", including diabetes. He left "other" blank.

Petitioner returned to Dr. Silver March 18, 2016 (PX #8). Dr. Silver noted the MRI scans demonstrated medial meniscus tears. He also noted the left ACL may have been partially torn but that the knee was not clinically unstable. Dr. Silver opined that the menisci to work injury on February 1 and that he required arthroscopic on both knees. On examination there was bilateral patellofemoral crepitation along with medial joint line tenderness. There were now positive McMurray tests bilaterally. Again, motion beyond 90° was painful. Petitioner reported 6/10 pain, but that hydrocodone would reduce pain to 3/10. Dr. Silver noted that Petitioner remained disabled. Dr. Silver renewed prescriptions for meloxicam, Protonix, hydrocodone (90), and Ultram.

On April 29, 2016 Dr. Silver was awaiting approval for the recommended arthroscopic surgeries for Petitioner's knees (PX #8). Dr. Silver wished to operate on the right knee first because pain there was worse. Petitioner's presentation on clinical exam was unchanged. Dr. Silver reduced the dosage for hydrocodone and Ultram and noted Petitioner was still disabled.

Petitioner's condition was unchanged when he saw Dr. Silver June 10, 2016. Petitioner reported his pain was 4–5/10 but reduced to 3/10 with pain medication. Dr. Silver continued to recommend arthroscopic surgery for both knees and continued Petitioner as disabled.

There were no significant clinical changes when Petitioner saw Dr. Silver July 29, 2016, although motion was painful beyond 100° (PX #8). Dr. Silver apparently reviewed the IME report which attributed Petitioner's symptoms to arthritis. Dr. Silver noted that it "completely ignores the fact that this gentleman named an injury caused pain, swelling, clicking and stiffness of his knees. It was an appropriate mechanism of injury to cause tearing of his menisci noted on his MRI scans." Dr. Silver went on to note that there is "no evidence whatsoever, even MRI scan of any significant arthritic changes" in Petitioner's knees. Dr. Silver noted that Petitioner's plain standing X-rays show only minimal degenerative changes in the region of the kneecap. He went on to note that the IME opinion of "degenerative meniscal tears" misstated the facts of the case and distorted the truth, particularly in light of radiologist's reading of the MRIs. Dr. Silver added that lacking appropriate arthroscopic care, Petitioner will have a permanent disability.

The June 1, 2016 IME report by Dr. John Cherf was incorporated in PX #3.

Dr. Silver also wrote a narrative report to Petitioner's George Chepov on July 29. Dr. Silver set forth a remodel to Dr. Cherf's IME opinions that petitioner sustained a contusion and that the meniscal tears were incidental to arthritis. Dr. Silver stated that his reading, as well as the radiologist's reading, of the MRIs did not demonstrate degenerative tears, which would have a distinctly different from Petitioner's MRIs. Dr. Silver added that degenerative meniscal tears are found with extensive arthritis which, he noted, Petitioner "did not even have any."

Dr. Silver went on to state the IME was a "complete mischaracterization of this gentleman's meniscal injuries." Further, Dr. Silver found the IME hypothesis "ludicrous at best" petitioner's history of never having had medical care or symptoms to his knees prior to his work accident. Finally, Dr. Silver refuted the IME finding of symptom magnification by noting that he had not observed symptomatic magnification or abnormal behavior over the months of his care of Petitioner.

Petitioner continued to follow with Dr. Silver on September 6 and December 7, 2016. Petitioner's clinical presentations and Dr. Silver's opinions were unchanged. Dr.

Silver wrote another narrative report to Petitioner's attorney December 22, 2016. He reiterated Petitioner's history and his opinion of the necessity of arthroscopic surgical repair of Petitioner's knees. He noted that Petitioner had "barely any sign of arthritis in his knees."

Petitioner returned to Dr. Silver January 25, March 22, August 2, September 27, and November 15, 2017. There were no changes in Petitioner's clinical presentation or Dr. Silver's opinions. There were no significant changes when Petitioner saw Dr. Silver January 17 March 14 May 9 and July 18, 2018, except for Dr. Silver's notes that Petitioner's knees continued to deteriorate. There was another narrative report to Petitioner's attorney on September 5, 2018. Again, Dr. Silver reiterated Petitioner's history and diagnoses, and his opinion of the necessity of surgery. He also reiterated his refutation of the IME findings and opinions.

MRIs of Petitioner's knees were taken February 24, 2016 at Lakeshore Open MRI and CT (PX #8). The right knee MRI demonstrated nonspecific bone marrow edema of the intercondylar region of the distal femur, presumably posttraumatic bone bruising; intact collateral and cruciate ligaments; medial meniscus tear involving the posterior horn; lateral meniscus intact; joint effusion; and peripatellar soft tissue swelling, presumably post-traumatic soft tissue bruising. There was also patellofemoral chondral and subchondral irregularity and some hypertrophic spurring. The radiologist also noted patient movement degraded the resolution of many images. The right knee MRI demonstrated attenuation and irregularity, suspicious of a partial tear. PCL, MCL, and LCL were unremarkable. There was a medial meniscus tear involving the apical free edge of the posterior horn but lateral meniscus was intact along with small joint effusion. There were some mild chondral and subchondral irregularities of the patellofemoral surfaces along with subchondral cyst in the region of the lateral femoral condylar and intra-condylar fossa region.

Petitioner's Exhibit #7, Vision Laboratories, is records of periodic urine toxicology screening ordered by Dr. Silver. Petitioner's urine was screened February 15 (billed February 18), March 18 (billed March 28), June 10 (billed June 16), and July 29 (billed August 3), 2016. February 15 was positive for tramadol only, which was consistent with the prescription. The March 18, June 10, and July 29, 2016 screenings were negative for any analgesics, including acetaminophen, hydrocodone, and tramadol, which was inconsistent with prescriptions. Dr. Silver did note in December 2016 Petitioner's reported that he could not afford to pay for medication.

Due to Petitioner's complaints of neck and back pain, Dr. Silver referred him for a pain management consultation with Dr. Jared Kalina. Petitioner first saw Dr. Kalina February 12, 2016 (PX #6). Petitioner gave a history of the work accident where a motor Petitioner was lifting slipped out of his grip "landing on the knee legs", causing him to fall

backwards and hitting his head on the ground. Petitioner complained of lower back pain which was worse with bending and prolonged standing, sharp stabbing pain in the neck radiating to the occiput, as well as down the mid spine and pain when turning his head and looking up. Petitioner denied a history of diabetes and high cholesterol.

On exam Dr. Kalina noted tenderness with palpation to the trapezuis, ipsilateral neck pain with oblique extension, positive axial compression test which reproduced radicular symptoms on the right. The thoracic examination was notable for tenderness with palpation to the medial portion of the left side. Examination of the lumbar spine noted tenderness to palpation bilaterally at the medial portion and ipsilateral low back pain with oblique extension. Bilateral straight-leg tests at 35° reproduced shooting pains down the legs in the distribution of the sciatic nerve. Bilateral Patrick's test reproduced posterior hip pain. Reflexes and sensation strength were intact; strength was normal.

Dr. Kalina diagnosed myalgia, lumbar radiculopathy, cervical spondylosis without myelopathy or radiculopathy, and sacroiliitis. Dr. Kalina noted that all diagnoses were acute in nature. He ordered pain medications with an "opioid agreement" and a urine drug screen and physical therapy.

At trial Petitioner described the symptoms in his neck and back for the first few months following the accident. He had difficulty sleeping at night due to pain. Turning his head also aggravated his pain. He rated his neck pain at 8-9/10 but stated that medication reduced his pain. Petitioner testified that he had low back pain with bending, sitting for longer periods, and walking. He rated his lower back pain at 8-9/10 and stated that medication reduced his pain.

On referral by Dr. Kalina Petitioner began physical therapy at La Clinica on March 4, 2016 and continued until November 1, 2016 (PX #10). Petitioner received treatment to his neck, lower back and his knees. Treatment consisted of therapeutic and rehabilitation exercises, inferential therapy, electrical stimulation for the cervical and lumbar spine as well as cold packs for the knees. Petitioner was also given a home exercise program. He testified that the regimen takes about 45 minutes and that he continues to do the exercises at least 3-4 times per week. Petitioner further testified that by 1½ months post injury he began seeing improvements with therapy.

Petitioner testified that in the days immediately following the accident he had so much pain that he was in tears. Although therapy helped the severe pain and allowed him to resume certain activities of daily life, he testified the pain has continued. He explained that before starting therapy he was unable to do almost everything but that with therapy, he began to be able to increase his movements and was able to do certain things even though he was in pain. Petitioner further testified that he took the oral, patch, and ointment medications prescribed by Drs. Silver and Kalina. He stated that the various medications helped manage his pain, minimized his symptoms and helped improve his

ability to function. Petitioner also testified that he had a history of pain, upset stomach, and nausea with medications, so he was prescribed a medication to help counter the effects of the various oral medications which helped him tolerate the medications.

Petitioner returned to Dr. Kalina on March 11, 2016. His subjective complaints and clinical presentation were unchanged. Dr. Kalina continued medication prescriptions and ordered another drug screen. He also referred Petitioner to a neurologist. He continued to keep Petitioner off work.

Dr. Kalina referred Petitioner for MRIs of the cervical spine and lumbar spine, which were performed March 16, 2016 at Lakeshore Open MRI and CT (PX #8). The lumbar spine demonstrated a 3-4 mm subligamentous broad-based posterior disk herniation at L5-S1 level, with a mildly extruded nucleus pulposus, noted to elevate the posterior longitudinal ligament and indent the ventral surface of the thecal, with mild bilateral neuroforaminal narrowing. There was normal curvature of the lumbar spine. The cervical spine revealed 2-3 mm posterior disc protrusions/herniations at C5-6, C6-7 and C7-T1, noted to elevate the posterior longitudinal ligaments and indent the ventral surfaces of the thecal sac at those levels. There was abnormal straightening and reversal of the usual cervical curvature, probably representing muscular spasm.

Dr. Kalina reviewed the March 16 lumbar MRI with Petitioner April 15, 2016. The cervical MRI and its report were unavailable. Dr. Kalina noted the lumbar MRI revealed an L5-S1 disc herniation and extruded nuclei pulposi lending to foramina stenosis. Petitioner clinical presentation and diagnoses were essentially unchanged. Dr. Kalina advised Petitioner to return to Dr. Mark Sokolowski for re-evaluation. The doctor ordered another drug screen.

Dr. Sokolowski first examined Petitioner on April 15, 2016 (PX #11). Petitioner complained of headaches in the occipital nerve distribution, neck pain with radiation to the periscapular region, lower back pain with radiation to the buttock, and bilateral knee pain. Petitioner gave a history of injury while lifting a motor which then fell on his knees and caused him to fall backwards onto the ground, striking the back of his head and his back. Petitioner testified that, as with his other treaters and IME physicians, he recreated the mechanism of the accident from lifting the motor and up until right before the fall. Petitioner rated his back pain at 4-5/10, neck pain at 7-9/10, and his bilateral knee pain at 5-10/10.

On examination Dr. Sokolowski noted an antalgic gait, considerable knee tenderness, neck pain and cervical facet tenderness, neck pain worse with extention and relatively relieved with flexion, periscapular tenderness, positive Spurlings sign bilaterally with reproduction of concordant periscapular pain and pain radiating into the shoulders, lumbar tenderness with radiation into the bilateral sciatic notches, straight-

leg raises reproducing concordant back and buttock pain without leg pain, and antalgic weakness of the bilateral quadriceps and hamstrings secondary to knee pain.

Dr. Sokolowski reviewed the MRI imaging of the spine. He noted an L5-S1 disc herniation, left greater than right, and a herniation at C5-6. He diagnosed cervical pain, cervical radiculopathy, lumbar pain, and bilateral knee pain. Dr. Sokolowski advised Petitioner to continue physical therapy and his medications regimen. He also referred Petitioner for a cervical facet injection at C5 through C7 and suggested that Petitioner might consider lumbar facet injections at L5-S1 as well. Petitioner was also prescribed a lumbar support and a TENS unit. Petitioner testified he utilized the back support and that he used the TENS unit on his neck, upper back and lower back daily. Both helped with his symptoms.

On June 3, 2016, Petitioner returned to Dr. Sokolowski. He reported that his pain was so severe that he had to go to Cook County Hospital, which he confirmed at trial. Petitioner explained to Dr. Sokolowski that therapy helped alleviate symptoms but that outside of therapy his pain would increase. He rated his pain at 8/10 for his neck and back and 7/10 for the periscapular and buttock pain. Dr. Sokolowski noted increased tenderness in the facet joints at C5 through C7. Dr. Sokolowski again recommended injections to help alleviate Petitioner's pain and symptoms.

Petitioner eventually underwent a series of 4 injections. On June 29, 2016 Dr. Kalina performed intra-articular facet joint blocks under fluoroscopic guidance at bilateral C5-6 and C6-7 (PX #6). On July 16, 2016 Dr. Nicholas Weber performed a bilateral L5-S1 intra-articular facet joint injections (PX #12). Petitioner reported that the injections provided significant relief, approximately 50%. However, the relief was not long-lasting and his symptoms returned.

Petitioner then saw Dr. Farooq Khan, another pain management physician at Northwest Chicago Medical, August 9, 2016. Petitioner described his work accident where the motor slipping out of his hands and landing on his legs/knees, then knocked Petitioner to the ground, causing him to strike his head (PX #16). Petitioner complained of pain in the lumbar region which was more severe, 8/10, than pain in the cervical region, 6/10. Petitioner reported his pain was exacerbated by ambulation, prolong sitting, prolong standing, bending, twisting, lifting, carrying, climbing, and transitional movement.

On examination Dr. Kahn found no frank loss of motor function or sensation. Lumbar extension, rotation and lateral bending but flexion was normal. Lumbar facet joints and paraspinous muscles were tender. Petitioner was neurologically intact. The examination of the cervical spine was essentially normal. Dr. Kahn diagnosed lumbar spinal stenosis, displacement of lumbar intervertebral disc without myelopathy, lumbosacral disc degeneration, cervical spondylosis without myelopathy, brachial

neuritis or radiculitis, and cervicalgia. Given Petitioner's positive response to the epidural injections, Dr. Khan recommended medial branch injections to further alleviate Petitioner's symptoms.

Dr. Kahn performed medial branch injections at L4 and L5 with facet blocks and the sacral ala covering two joints bilaterally at L4-5 and L5-S1 on August 9, 2016 (PX #12). Dr. Kahn performed bilateral medial branch blocks at C5, C6, and C7 on September 6, 2016 (PX 12). Petitioner once again reported significant relief from the injections.

Given Petitioner's positive response Dr. Kahn recommended a radiofrequency ablation. On November 18, 2016 Dr. Kahn performed a bilateral percutaneous radiofrequency cervical medial branch neurotomies at C5, C6, and C7 (PX 12).

Petitioner testified at trial that each of the injections provided significant relief of his symptoms. However, the relief was not long lasting and his symptoms, although less severe, did eventually return. Petitioner also testified that along with the injections he was prescribed an icing machine that was delivered to his home and used to help relieve pain.

Petitioner last saw Dr. Silver on July 18, 2018. The examination was positive for bilateral medial joint line tenderness and effusion and McMurray's tests. Dr. Silver continued with his recommendation for bilateral arthroscopic surgery.

Petitioner testified at trial that medications and therapy improved his pain and significantly improved his function. He further testified that during the time he was off work he did leave his house, drive his car, take his kids to school, and run errands for his family. Petitioner also explained that while some days were better than others, he performed activities of daily life and eventually returned to work despite and while in pain.

Petitioner returned to work September 20, 2016. He testified that he specifically looked for lighter work that would not exacerbate his symptoms but that would still allow him to help support his family. After looking work for a few months, Petitioner received a job as part of the night cleaning crew at Gibson's Restaurant in Rosemont. He testified that his job duties consist mostly of wiping down tables, kitchen counters and doors and using a manual roller vacuum. He further explained that he does not have to do any heavy lifting and that he does very occasional kneeling or squatting which is limited to picking a piece of paper off the floor. He wears a back brace while working but that sometimes he is unable to last a full 8-hour shift and has to sit down because of pain or has coworkers help him.

Petitioner testified that he continues to have pain and limitations daily. He rated his knee pain as a 4/10 at best and 7-8/10 at worst. He explained that he has pain and twitching in the bilateral knees with walking and standing for more than a short period of

time. He testified and demonstrated that he has clicking with straightening of the knee and popping with standing. Petitioner rated his lower back pain as a 7-8/10 and his neck pain as 5-6/10. He explained that he still has trouble sleeping, pain with prolonged sitting and pain when turning his head.

Petitioner testified that to manage his current pain and symptoms he continues to do his home exercise program for his knees, neck, and lower back 3-4 times a week. His regime takes approximately 45 minutes to 1 hour to complete. He also uses his TENS unit 3 to 4 times per week. Petitioner testified he tries to limit his medications but that he takes prescription medications 2 to 3 a week, over the counter medications 2 to 4 times a week and continues to regularly use the prescription ointments from his treating doctors.

Petitioner testified that since the accident, he has not returned to any heavy labor work, he has not engaged in any strenuous activities nor has he suffered any falls or injuries. He testified his pain and symptoms greatly interfere with his ability to perform activities of daily life and impair his quality of life. He further testified that he fears if he continues to walk and work with his knees in their current condition, that he may soon be unable to walk. Petitioner testified at hearing that he is eager to have surgery and wants to return to work and his daily life without pain.

Dr. Silver testified at his evidence deposition April 25, 2018 (PX #19). Dr. Silver is a board-certified orthopedic surgeon who limits in his practice to the knee and shoulder. Dr. Silver testified that he first saw petitioner February 5, 2016. Petitioner gave a history of working as a disassembler of motors. He was carrying a heavy motor, approximately 200 pounds. Petitioner reported he could no longer carry the motor and fell backwards onto the ground. The motor crashed upon the front of his knees in a crushing type mechanism. Petitioner reported that he had not had any prior medical care or symptoms with his knees and had been working full time without restriction.

Petitioner reported that he was taken by ambulance to the emergency room where no fractures were noted. On examination February 5 Dr. Silver noted crepitation in the patellofemoral compartment of both knees. He took standing AP X-rays, lateral, and skyline X-rays. Although there was a tiny spur around the knee cap on both knees the X-rays showed normal wear for Petitioner's age. Dr. Silver stated the X-rays showed "no degenerative changes whatsoever." On cross-examination he testified that he would have noted degenerative changes in his chart had there been any. There was medial joint line tenderness and swelling in both knees.

Dr. Silver testified that he ordered MRIs of the knees due to concern for cartilage damage. He ordered physical therapy to regain motion and strength. He also ordered hydrocodone for higher levels of pain and Ultram for lower levels pain. He also ordered topical anti-inflammatories due to Petitioner's problems with gastrointestinal complaints

with medication. Dr. Silver also referred Petitioner to a spine specialist for his neck and back complaints.

Dr. Silver reviewed Petitioner's MRIs March 18, 2016. The MRIs showed medial meniscus tears in both knees but no significant degenerative changes in the knees but did show bone marrow edema intracondral region of the distal femur, suggestive of posttraumatic bone bruising. Dr. Silver noted that the MRI findings were consistent with trauma and inconsistent with degeneration. He noted that degenerative meniscus tears are associated with an elderly population with very severe arthritis. Dr. Silver also noted that there was a suspicious partial tear of the left ACL but that was not severe enough to cause a difference in Petitioner's clinical examination or stability of the joint.

Dr. Silver testified that arthroscopic surgery was the necessary option because meniscal tears cannot heal on their own because they lack their own blood supply. He explained that in surgery he would "remove the torn pieces of cartilage that are irritating the knee, thereby stopping the pain and swelling from occurring so that, then, the patient can rehabilitate or regain motion and strength and normal function of the joint."

Dr. Silver opined that the medial meniscus tears were caused by crushing injury petitioner sustained at work February 1, 2016. Petitioner's subjective complaints were consistent with the mechanism of injury and findings on the X-rays and MRIs. He recommended arthroscopic repair of both knees but wanted to do the right knee the first because it was more severe than the left. Dr. Silver testified and that Petitioner reported stomach problems in connection with taking medications and therefore he was prescribed medication to help minimize stomach issues. Dr. Silver also testified that Petitioner was instructed to use patches and ointments first and to only use the oral medications for higher pain levels.

Dr. Silver took pointed exception to the IME findings and opinions of Dr. Cherf. He noted that his history was different from that of Dr. Cherf. Dr. Silver saw no evidence of petitioner's exaggeration of symptoms. He found no nonphysiologic findings of any kind. Dr. Silver found the IME opinions a complete "distortion of non-existent facts," further adding it was maddening to go over a report "not supported by any objective evidence whatsoever." Dr. Silver further added that he disagreed with the diagnosis of the IME physician because Petitioner had no previous history of knee problems and that the mechanism of injury was appropriate to cause meniscal tearing. Dr. Silver added that subsequent X-rays he took were inconsistent with Dr. Cherf's X-ray findings at the IME.

On cross-examination Dr. Silver testified that because he speaks Spanish he conversed with petitioner directly, although he did not recall if he spoke Spanish with Petitioner on each and every visit. Dr. Silver would rely on Spanish speaking staff to assist when needed.

On further cross-examination Dr. Silver acknowledged that he had not reviewed Petitioner's records from Presence St. Mary's Hospital or from Physicians Immediate Care or from La Clinica. Dr. Silver also testified that degradation of MRI images by patient was minimal and did not affect his interpretation of the imaging. He also acknowledged that petitioner had been referred to him by "Med-Legal."

Petitioner was examined by neurologist Dr. Russell Glantz pursuant to §12 of the Act on April 25, 2016. Dr. Glantz's report, RX #1, was admitted in evidence. Petitioner testified that he provided Dr. Glantz a detailed account of how the injury occurred that said history was consistent with his testimony at hearing and that which was provided to his other medical treaters. Petitioner further testified that Dr. Glantz performed a limited examination that consisted of mainly of questions testing his memory. Dr. Glantz utilized an interpreter for the IME.

Petitioner reported that he sees, or has seen, two doctors, one who gives them five pills and the other one three pills. He reported that he receives physical therapy three times a week for his neck and back and also therapy his knees. Petitioner reported that he did have elevated cholesterol in the past, which was treated.

Petitioner reported that his normal job at Valley Recycling in Kankakee, Illinois, a recycling company. Petitioner reported that he was not working at the time of the exam. Petitioner reported that he was injured on February 1 or February 2. He reported that he was taking pieces of metal from a box on the floor to the table and that he began to slip. The pieces hit him on the knees and he fell backward, hitting his head. Although things were "blurry" he did not think he lost consciousness. He was taken to a clinic and then from the clinic by ambulance to a hospital in Kankakee. Two days after that he had strong headaches and went back to the ER, when he was given medication. Petitioner reported that he began his current treatment on referral from his lawyer about 15 days later.

Petitioner complained that he needed to move his head and neck around to feel better and that he had pain in the back of the neck and head. He also complained that he has low back pain when he sits down or lays on his stomach. He reported that he has "streaks" of pain and that when he is sitting his knees go numb so he needs to stand up. He also complained of pain in his knees when he touched his knees.

In addition to a clinical examination, Dr. Glantz reviewed Petitioner's records from Physicians Immediate Care, Presence St. Mary's Hospital in Kankakee, Dr. Ronald Silver, and Kalina Pain Institute. On examination Petitioner was alert and oriented and was able to answer all questions without difficulty. Dr. Glantz noted Petitioner's speech was accented but normal. Gait was normal. Petitioner's neck was tender to light touch, but

the muscles were soft. Petitioner was also tender over the trapezii. Neck range of motion in the vertical plane was normal but reduced by 10° on the right and normal on the left. Upper extremity strength was normal and sensation was also. Examination of the lower extremities was also normal. Petitioner was cognitively normal.

Dr. Glantz found a normal neurologic exam. There was no diagnosis of neurological ill-being at that time. Dr. Glantz opined that Petitioner's neurological complaints (head and neck) were not causally related to the work accident. He found no physiological reason for Petitioner's persistent had pain. He opined that Petitioner did not require additional neurological care and was at MMI with his neurological state. Dr. Glantz did note that there were no obvious signs of symptom magnification but did opine that symptoms at the time of the examination were magnified in light of the passage of 3 months following a minor head injury.

Petitioner was examined pursuant to §12 of the Act for his spine conditions on May 18, 2016 by Dr. John Cherf. Dr. Cherf's May 18 report, RX #2A, was not received in evidence based on hearsay objection. Dr. Cherf wrote an addendum report May 25, 2016 (RX #2B), which was also not received in evidence based on hearsay objection. Dr. Cherf examined Petitioner's knees pursuant to §12 of the Act on June 1, 2016. His report, RX #2C, was also not received in evidence based on hearsay objection.

Dr. Cherf began testimony at his evidence deposition August 15, 2018 (RX #3A) and continued testimony on October 1, 2018 (RX #3B). Dr. Cherf refreshed his memory with his 3 reports, occasionally reading verbatim from the reports. He reviewed medical records from Physicians Immediate Care, Presence St. Mary's Hospital, Dr. Ron Silver, Kalina Pain Institute, right and left knee MRI reports, MRI imaging and reports of the cervical spine and the lumbar spine, IME report of Dr. Russell Glantz, and 3 surveillance videos from DigiStream Investigations.

The May 18, 2016 IME was limited to examination of Petitioner's cervical spine and lumbar spine. Dr. Cherf noted his difficulty in understanding Petitioner from time to time even with an interpreter. He recounted Petitioner's history of his February 1, 2016 accident when he lifted a motor off the ground, lost his grip, and fell backwards onto his back. Dr. Cherf read from his May 18 report, RX #2A. He recounted Petitioner's history of his February 1, 2016 accident when he lifted a motor off the ground, lost his grip, and fell backwards onto his back. Petitioner described impartially recuperated the mechanism of injury at the IME. Petitioner was taken to Physicians Immediate Care and from there by ambulance to St. Mary's Hospital. There was an extensive workup at St. Mary's, including CT scans of the cervical spine, pelvis, abdomen, chest, and head, as well as chest and pelvis X-rays. Petitioner followed up at PIC and St. Mary's, but it was unclear to Dr. Cherf when those visits occurred.

Dr. Cherf explained that asking injured workers to recreate the mechanism includes having them show what position they were in and as in this case, Petitioner was lifting, where the impact onto the legs was and the position in which he landed. Dr. Cherf testified that both times Petitioner recreated the mechanism of accident he was in a squatting position with his knees bent, and both his knees and hips flexed when the motor struck his legs, and then subsequently falling backwards.

Petitioner reported that his "secretary" referred him to La Clinica, where he was evaluated on February 4. Petitioner was referred by his attorney to Dr. Silver, who evaluated him on February 5. Petitioner also reported that his attorney referred him to Dr. Kalina and saw him on February 12. Petitioner reported the MRIs of his knees on February 24 and continuing care at La Clinica and with Dr. Kalina for his neck and back. Dr. Kalina recommended spinal injections and Dr. Silver recommended knee surgery.

Dr. Cherf noted MRIs of the cervical spine and the lumbar spine were done March 16, 2016. There was an IME by Dr. Glantz on April 25, 2016.

Petitioner described his neck pain as 9/10, with 20% function. He denied any numbness tingling or weakness in his upper extremities. Petitioner described his lumbar pain as 8/10, with 20% function. He denied radicular symptoms into the legs. Petitioner reported his lumbar symptoms are exacerbated with sitting, driving, and leaning back with relief by lying face down.

Dr. Cherf reiterated his struggle with obtaining a history even with an interpreter. He noted that Petitioner's answers and description of his injury and treatment seemed convoluted and difficult to understand. Petitioner seemed elusive and had difficulty answering simple straight forward questions. Petitioner displayed abnormal illness behavior, including symptom magnification, limitation of effort, overreaction to examination, superficial and nonanatomic tenderness, and what appeared to be non-physiologic findings.

Dr. Cherf specifically noted the nonphysiologic tenderness to palpation of spinous processes as well as neighboring muscles with no spasm. Petitioner had decreased flexion–extension, lateral bend and rotation. Upper extremity motor strength was normal. Sensation was intact and reflexes were normal. On examination of the back, Petitioner displayed appeared to be nonphysiologic tenderness where there was no spasm he had a full range of motion. He had negative straight-leg raising. Strength was normal and sensation was intact.

Dr. Cherf found no significant abnormal objective findings in Petitioner's neck or

back. Dr. Cherf raised concern about the degree to which Dr. Silver prescribed and dispensed medications. He diagnosed a cervical spine sprain/strain and a lumbar spine strain from a work-related injury on February 1, 2016. He opined that regarding the neck and back Petitioner could return to full time, full duty work with no restrictions.

Dr. Cherf wrote an addendum IME report May 25, 2016 (RX #2B). By then he had reviewed the MRI imaging of the cervical spine and lumbar spine from March 16, 2016. He had also reviewed 3 surveillance videos dated February 19, February 23, and April 22, 2016. Dr. Cherf recounted what he observed in the 3 video recordings. Review of the MRIs and the video surveillance did not change his opinion that Petitioner sustained cervical spine and lumbar spine strains. He stated that Petitioner would be at MMI with regard to the cervical spine and lumbar spine within 4 months of the accident.

Respondent objected to Dr. Cherf's opinions about the medical reasonableness of injections recommended by Dr. Kalina based on the 48-hour set forth in *Ghere v. Industrial Comm'n*. The objection was sustained, and the opinions were disregarded.

Dr. Cherf then testified about his IME of Petitioner's knees on June 1, 2016. Petitioner's bilateral knee subjective complaints included exacerbation of pain with standing for long periods and walking up and down stairs, as well as relief of symptoms with rest. Petitioner rated the pain in his right knee at 6/10 and described his function at 50% and rated pain in his left knee at 5/10 with 60% function. He further testified that Petitioner pointed to patellar tendon as point of maximum tenderness.

Petitioner testified at trial that the examination was limited to being asked to walk a little and some light touches to the knees. Dr. Cherf and Petitioner both testified that Dr. Cherf advised Petitioner that he had reviewed surveillance videos of Petitioner. Petitioner testified that Dr. Cherf advised him that the videos showed him walking on stairs and "asserting that I had nothing wrong with me," because of the videotapes.

Dr. Cherf performed standing, weight-bearing X-rays of Petitioner's knees at 45°, which are sensitive for assessing joint space narrowing. He found osteoarthritis on those X-rays, as well as the February 24 MRIs. There was bilateral tricompartmental osteoarthritis, most advanced disease in the medial compartment of the patellofemoral joint and kneecap compartment, significant joint space narrowing as well as significant osteophytes. Petitioner had significantly more arthritis than expected the person of age 45. Dr. Cherf further testified that most people with these X-ray findings have degenerative meniscal tearing. He opined that the mechanism of injury, been contusions to the thigh, would not cause meniscal tearing.

Dr. Cherf also testified regarding his personal review of the reports of the knee MRIs. He did not review the actual MRI imaging. His found osteoarthritis, some edema in the intercondylar area, posterior horn, medial meniscal tear and some peripatellar soft tissue swelling in the right knee and osteoarthritis with irregular edema at the medial meniscus in the left. Dr. Cherf believed that the tears of the menisci were degenerative and related only to pre-existing arthritis.

Dr. Cherf diagnosed bilateral distal thigh contusions, that area right above the knee joint plus osteoarthritis and degenerative meniscal tears of both knees. He opined testified that the contusions were causally related to the accident and that it was possible that the contusion caused a temporary exacerbation of the pre-existing arthritis. However, he believed that the meniscal tears were pre-existing and in no way aggravated or exacerbated by the occurrence. Dr. Cherf opined that Petitioner could return to work with no restrictions and that he believed he needed additional 4 weeks to July 1, 2016 to reach MMI.

Dr. Cherf stated that cortisone injections to the knees to treat the exacerbation of the arthritis. But, he noted that surgery was not necessary as it is not the recommended treatment for degenerative tears of the medial meniscus in patients with osteoarthritis was not necessary to treatment any condition related to Petitioner's accident.

Dr. Cherf testified that persons with meniscus tears and/or osteoarthritis have symptoms that can wax and wane. He further testified that they can also perform activities of daily life, walk up and down stairs, get in and out of a car, go to work, play sports, and that many individuals are even very high functioning. He further explained that pain medications and anti- inflammatories can help with pain complaints and symptoms to allow increase in function.

Respondent submitted as Exhibits #4, #5, and #6, various edited surveillance videos from February 18, February 23, and April 22, 2016, respectively. Respondent's Exhibits #7, #8, and #9 were corresponding summary reports for surveillance on February 18, February 23, April 20 and April 22, 2016.

RX #4, February 19, showed Petitioner walking with an apparent right-sided limp and using a cane. It also showed Petitioner ascending and descending several steps slowly.

RX #5, February 23, shows Petitioner walking with a right-hand cane and a slight limp. Petitioner was observed entering the Kankakee County Community Services office where he sat without apparent signs of discomfort for approximately 50 minutes.

Petitioner was also observed apparently filling out paperwork while bent forward at the waist.

RX #6, April 22, showed Petitioner assisting in changing a truck tire. Petitioner was often obscured by passing street traffic. However, Petitioner was shown walking without an apparent limp or limitation while rolling a truck tire bending forward at the waist. Petitioner was also observed bending to 90° at the waist several times and bending and squatting onto his knees without apparent discomfort or limitation. At one point Petitioner got down onto his stomach at the front of the truck to do something underneath the truck's front end. Last, Petitioner was observed carrying an apparently heavy floor jack.

This evidence was admitted through the testimony of investigator David Aranda. Mr. Aranda is a work flow assistant DigiStream Investigations. He testified that he conducted the surveillance of Petitioner on February 19 and that Michael Cleary conducted surveillance on February 23 and that Scott Scholz conducted surveillance on April 20/22 2016. Mr. Aranda testified that video recordings raw footage is edited. He testified that the video recordings as well as the reports were made and kept in the ordinary course of business of DigiStream Investigations.

Respondent offered its Exhibit #10a, Immediate Injury Report signed by Dalia Gonzalez, dated February 1, 2016, and Exhibit #10b, Elite Accident/Injury Report also signed by Dalia Gonzalez dated February 1, 2016. Both RX #10a and RX #10b were admitted without objection. Each summarized Petitioner's report that he tried to pick up a motor which slipped out of his hands, knocking him onto his back and landing on his legs. Petitioner testified that he did not write either report.

Respondent offered several Utilization Reviews/Peer Physician Reports in accord with §8.7 the Act. RX #11a, dated February 26, 2016, authored by Steven Blum, MD, "non-certified" prescriptions for Protonix, tramadol, and topical pain cream. RX #11b, dated February 26, 2016, also authored by Dr. Blum, "non-certified" prescriptions for Colace and Fexmid. Dr. Blum certified prescription for Mobic, 7.5 mg two times a day times 30 days. RX #11c, dated February 26, 2016, authored by Dr. Blum addressed to Petitioner, confirmed the non-certification of Protonix, tramadol, and topical pain cream and informed Petitioner that a peer discussion had been afforded but not taken place. RX #11d, dated February 26, 2016, authored by Dr. Blum addressed to Petitioner, confirmed the non-certification of Colace and Fexmid and the approval of Mobic, as well as informing Petitioner that a peer discussion had been afforded but not taken place. Dr. Blum is board-certified in anesthesiology with the subcertification in pain medicine

RX #11f, dated May 13, 2016, authored by Edwin Rabin, DC, "non-certified" proposed physical therapy/chiropractic care from March 4 to March 25, 2016, and

continuing, but authorized physical therapy times 12 visits starting March 4, 2016. RX #11e, dated May 13, 2016, authored by Dr. Rabin, addressed to Petitioner, confirmed the non-certification, as well as the offer of a peer-to-peer conversation. RX #11h, dated May 13, 2016, also authored by Dr. Rabin, "non-certified" a TENS unit, moist heat unit, and lumbar orthosis. RX #11e, authored by Dr. Rabin and addressed to Petitioner, confirmed the non-certification, as well as the offer of a peer-to-peer conversation.

RX #11i, dated June 14, 2016, authored by Mehras Akhavan, M.D., also "non-certified" a TENS unit, moist heat unit, and lumbar orthosis, as well as noting the right to a peer-to-peer discussion. Dr. Akhavan is board-certified in physical medicine and rehabilitation as well as pain medicine.

There was no record or evidence that any of the utilization reviews were rebutted or subjected to peer-to-peer review.

CONCLUSIONS OF LAW

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

This issue was not genuinely disputed. Petitioner testified that he was engaged in his assigned job tasks when that heavy engine slipped from his grasp and caused him to fall over backwards onto his back. Respondent's own Injury Reports, Respondent's Exhibits #10a and 10b, clearly demonstrated that Petitioner was injured in an accident arising out of and in the course of his employment.

Injuries sustained on an employer's premises, where an employee would be performing his or her job duties, and while the employee is in fact at work are compensable under the Act. Accordingly, the Arbitrator finds that Petitioner proved that he sustained injuries 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 injury?

The evidence established that on February 1, 2016 Petitioner attempted to lift a heavy motor, perhaps weighing 200 pounds. When he lost his grip, Petitioner fell over backwards onto the floor, striking his back and the back of his head and the heavy motor landing on his legs. It is disputed, based on conflicting histories provided by petitioner, whether the motor landed on his thighs or on his knees. It is not disputed that Petitioner sustained injuries of some nature to his back and neck and his legs.

Petitioner submitted evidence, including his testimony, that he sustained injuries to his cervical spine and lumbar spine which required both conservative medical care and interventional care. Petitioner initially saw orthopedist Dr. Ronald Silver. However, Dr.

silver limited his practice to shoulders and knees and therefore referred Petitioner to other physicians care for the neck and back. Petitioner received medical care for his neck and back Drs. Mark Sokolowski, Jared Kalina, and Farooq Khan. Petitioner was referred to La Clinica for chiropractic care. Drs. Kalina and Khan for pain management specialists who, with Dr. Nicholas Weber, administered interventional injections to petitioner's cervical spine and lumbar spine, as well as a radiofrequency ablation by Dr. Kahn.

MRIs of Petitioner's cervical spine and lumbar spine is performed March 16, 2016. There were disc protrusions/herniations at C5-6, C6-7, and C7-T1. Although various treating physicians adopted these findings with their diagnoses, none opined that these abnormalities were causally related to Petitioner's work accident. The lumbar MRI demonstrated a disc herniation with extruded nucleus pulposus at L5–S1. Again, various treating physicians adopted this finding with their diagnoses but did not opine that this abnormality was causally related to Petitioner's work accident.

Although there was no specific causation rebuttal regarding the neck and back by Respondent's IME examiner, Dr. John Cherf, the Arbitrator notes that the MRI findings are suggestive of degeneration which existed before Petitioner's February 1, 2016 work accident. Dr. Cherf did opine that Petitioner sustained sprains and strains of the cervical spine and lumbar spine. Petitioner's treating physicians generally diagnosed myalgias and radiculopathy without clear clinical signs and symptoms of radicular pain.

Petitioner followed with Dr. Silver for his complaints with his knees. Dr. Silver diagnosed bilateral medial meniscus tears in Petitioner's needs which were caused by petitioner's February 1, 2016 work accident. On the other hand, Respondent's examining IME orthopedist, Dr. Cherf, opined that the medial meniscus tears were degenerative and present before the work accident.

Drs. Silver and Cherf had starkly conflicting interpretations of radiological imaging of Petitioner's knees. Dr. Silver was adamant that Petitioner did not have osteoarthritis in his needs prior to and at the time of his accident, although alternatively stating "no arthritis whatsoever" and stating "barely any arthritis." Dr. Cherf was equally adamant in his finding of pre-existing arthritis. Further, Drs. Silver and Cherf disagreed regarding the necessity of arthroscopic repair of the meniscus tears and, technically, whether that recommended surgery was medically necessary to treat an injury related to the work accident.

The Arbitrator notes that Petitioner exhibited questionable credibility at the time of trial. The Arbitrator notes that physicians' opinions regarding diagnosis and treatment plans are dependent on the accuracy and reliability of their patient's history and report of subjective symptoms. Petitioner acknowledged that he had a speech disability which impaired his communication. The Arbitrator notes that Petitioner had difficulty testifying at trial and at times was not fully responsive to questions. Petitioner has a 6th grade

education which he completed at the age of 15. The Arbitrator further notes that Petitioner testified to a speech delay and deficit and that difficulty understanding Petitioner was expressed by the translator during trial on various occasions. While the Arbitrator does not find that Petitioner was necessarily untruthful, an inability to effectively communicate presents additional burdens to Petitioner to prove his case by the preponderance of the evidence.

However, the Arbitrator does find that Petitioner was, at the least, disingenuous if not untruthful when testifying at trial. Petitioner testified that among his ongoing complaints was pain and discomfort when he sat for long periods of time. Surveillance video on February 23, 2016 showed Petitioner sitting without apparent discomfort for 50 minutes at the Kankakee County Community Services office. The Arbitrator notes that at the time of the accident and through the course of his medical care Petitioner resided in Kankakee, Illinois. Except for his emergency care, Petitioner was treated by physicians and at facilities located in Chicago, more than 50 miles and more than one hour of travel time from his home. There was no evidence that Petitioner's travels to and from Chicago for medical care were at all arduous, burdensome, or in any way uncomfortable or painful.

Further, Petitioner testified at trial that he suffers from diabetes and yet consistently denied that to his treating physicians.

However, the Arbitrator finds the video surveillance recorded April 22, 2016 compelling. The April 22 surveillance shows Petitioner engaged in activities and movements which belie his claim of current ill-being. Petitioner was observed walking stooped and bent over at the waist, lifting heavy objects, squatting, kneeling, and crawling on the ground. Petitioner displayed an ability to perform tasks the Arbitrator finds inconsistent with his complaints of neck pain, back pain, and bilateral knee pain, all during the period of time in which he was receiving medical care for those same complaints.

Petitioner's questionable credibility undermines the causation opinions expressed by his treating physicians. Medical opinions based on inaccurate or unreliable reports from a patient undermine the credibility of those opinions. Dr. Silver, as stated before, was adamant in his opinion that Petitioner's work accident caused the medial meniscus tears in Petitioner's knees. Unlike Dr. Cherf, Dr. Silver did not have access to the surveillance videos.

In addition, the Arbitrator notes that Dr. Silver prescribed the analgesic medications of tramadol and hydrocodone. Dr. Silver, in exercise of cautious medical practice, ordered periodic drug screening tests. Except for the first screening test which showed evidence of tramadol, each of the subsequent 3 screenings showed no evidence of analgesics, including acetaminophen, in Petitioner's system. Yet, Dr. Silver continued to renew analgesics, including narcotics. This evidence of Petitioner's apparent lack of

taking prescribed pain-relieving medication suggests that Petitioner's complaints of ongoing pain were not genuine. Further, this pattern undermines Dr. Silver's credibility and the persuasiveness of his opinions when he did not follow up and investigate Petitioner's pattern of not taking prescribed pain medication.

The Arbitrator further notes that Dr. Silver's charting practices undermined the reliability and persuasiveness of his opinions. He testified at his deposition that Petitioner had a history of gastrointestinal sensitivity to medication but did not appropriately chart that Petitioner specifically stated that. None of the other of Petitioner's treating physicians noted that sensitivity when ordering medication for Petitioner. In addition, Dr. Silver ordered medications, devices, and procedures without documenting the bases or necessity for those orders.

There was evidence that Petitioner had sought intervention for his claimed accident related complaints at Cook County Hospital but did not submit those records in evidence. This can only lead to speculation as to what is contained in those records, but a negative inference may be drawn if those records were exclusively available to Petitioner. The records were equally available to the parties by subpoena.

Petitioner was also examined pursuant to §12 of the Act by neurologist Dr. Russell Glantz. Dr. Glantz examined petitioner for claimed neurological abnormalities in complaints. Dr. Glantz found that whatever neurological condition Petitioner may have had as a result of the accident had resolved, and that Petitioner was at MMI as of that April 25, 2016 IME.

Given Petitioner's questionable credibility and the misplaced reliance of his treating physicians on clearly an accurate reporting from Petitioner, the Arbitrator finds the causation opinions of Respondent's IME examiners, Drs. Glantz and Cherf, to be reasonable and persuasive. Accordingly, the Arbitrator finds that Petitioner failed to prove that he sustained anything more than soft tissue sprains and strains to his cervical spine, his lumbar spine, and his knees, all of which had resolved and rendered Petitioner at MMI by June 1, 2016. Further, Petitioner's return to work to a job which required him to be his feet for extended periods, as well as requiring bending and stooping, further support this finding.

Petitioner failed to prove that he sustained an injury which caused any objective pathology to cervical spine, his lumbar spine, or his knees. Petitioner failed to prove that he sustained any injury to his head other than short-term headaches.

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

The Arbitrator previously found the opinions of Drs. Glantz and Cherf to be reasonable and persuasive. Dr. Glantz found that Petitioner was at MMI with regard to Petitioner's claimed head and neurological injury by the time of Dr. Glantz's IME, April 25, 2016. Dr. Cherf opined that Petitioner would be at MMI by July 1, 2016 regarding Petitioner's orthopedic injuries. It is noteworthy that Petitioner returned to work cleaning restaurants without physician restrictions in September 2016 (presumably September 20 in light of Petitioner's TTD claim).

The Arbitrator notes that $1,250.00 in transportation costs Northwest Chicago Medical was listed in Petitioner's Medical Table, PX #18. There was no evidence that such transportation was medically necessary or ordered by any of Petitioner's treating physicians or that it had in fact been provided. The claim for transportation is denied.

Dr. Silver prescribed topical anti-inflammatory and analgesic creams. His documentation for the medical necessity for those medications is scant to non-existent. He did not adequately note that petitioner actually reported this history.

In addition, Petitioner failed to offer rebuttal to the Utilization Review findings stated in Respondent's Exhibits #11a, #11b, #11f, #11h, and #11i. Accordingly, the Arbitrator adopts the denial of authorization set forth in Respondent's Exhibits #11a, #11b, #11f, #11h, and #11i.

Petitioner's claim for benefits for Protonix, tramadol, and topical pain cream is denied. Petitioner's claim for benefits for Colace and Fexmid is denied. Petitioner's claim for 7.5 mg Mobic for 30 days is approved.

Petitioner's claim for benefits for physical therapy from March 4 through March 25, 2016 is denied but 12 therapy visits beginning March 4, 2016 are approved. Petitioner's claim for benefits for the durable medical devices of TENS unit, moist heat unit, and lumbar orthosis is denied.

The Arbitrator finds that Petitioner had achieved MMI July 1, 2016, as opined by Dr. Cherf. Therefore, the Arbitrator failed to prove that Petitioner failed to prove that the medical care and treatment after July 1 was medically necessary or reasonable.

K: Is Petitioner entitled to prospective medical care?

Given the Arbitrator's findings and the reasoning supporting those findings stated above, the Arbitrator finds that Petitioner failed to prove that he is entitled to the prospective medical care recommended by Dr. Silver. Again, the Arbitrator notes the compelling surveillance video from April 22, 2016. Petitioner exhibited no evidence of pain or limitations with his knees when stressing the knees with squatting, kneeling, and crawling on the ground. This does not support a claim of a medical condition in the knees which requires surgery.

L: What temporary benefits are in dispute? TTD

Petitioner claims entitlement to TTD benefits from February 2 through September 19, 2016, 32 & 6/7 weeks. In light of the Arbitrator's finding that Petitioner had achieved MMI by July 1, 2016, the Arbitrator finds that Petitioner is entitled to TTD benefits from February 2 through July 1, 2016, 21 & 3/7 weeks.

M: Should penalties be imposed upon Respondent?

Petitioner claims he is entitled fees and penalties pursuant to §16, §19(k), and §19(l) of the Act. Petitioner filed his Petition August 24, 2018. The Arbitrator has found that petitioner was at MMI by July 1, 2016. Therefore, it was reasonable to terminate benefits after July 1. The Arbitrator notes that Petitioner's Petition generally states conclusions but no facts other than the date of accident. While the Arbitrator finds Petitioner's Petition for Penalties deficient on it's face, the Arbitrator has previously found that Petitioner failed to prove that he was entitled to benefits after July 1, 2016.

Petitioner's claim for fees and penalties is denied.

Steven J. Fruth, Arbitrator

February 15, 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 down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elbin Sosa,

Petitioner,

vs.

No. 10 WC 33065

In & Out Moving and Storage, Novestaff, and Injured Workers' Benefit Fund,

21IWCC0036

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein, Injured Workers' Benefit Fund ("IWBF"), and notice given to all parties, the Commission, after considering the issues of liability of the Injured Workers' Benefit Fund 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 Fact:

Petitioner, 47, testified that on June 25, 2010 he worked as a driver and foreman for Respondent, In & Out Moving and Storage, although he received his paychecks from Respondent, Novestaff.[1] On that date, as Petitioner was pulling a large dresser, he fell and the dresser fell on him. He felt pain in his right knee, and sought treatment in the emergency room of Swedish Covenant Hospital, where he was diagnosed with an acute right knee sprain.

[1] Petitioner's W-2 form for the year 2010 shows he was paid by *Novestaff Services Group.*

21IWCC0036

The following day, Petitioner saw orthopedic surgeon, Dr. Klaud Miller. Dr. Miller ordered an MRI which, on July 28, 2010, revealed a tear in the body and posterior horn of the medial meniscus. Petitioner underwent two right knee surgeries by Dr. Miller. On August 9, 2010, Dr. Miller performed an arthroscopic partial medial meniscectomy and excision of medial synovial shelf. Because that didn't fully resolve Petitioner's symptoms, Dr. Miller performed an arthroscopic partial lateral meniscectomy and chondroplasty of the trochlea on November 12, 2010. Following the surgeries, Petitioner underwent physical therapy, but he still continued to experience pain, swelling and tenderness of his patellar tendon and hamstring.

On March 4, 2011, Petitioner underwent a functional capacity evaluation, which found him able to work at a Medium physical demand level, except for lifting floor to knuckle, which placed him at a Light physical demand level. The FCE report also found Petitioner not physically able to return to his prior job, which required a Heavy to Very Heavy physical demand level.

Petitioner's right knee problems persisted after his FCE. He sought treatment with Dr. Ruble and Dr. James, who provided chiropractic treatment; and with pain management physician, Dr. Diesfeld, who provided multiple knee injections. On April 29, 2013, Dr. Diesfeld reported that Petitioner's October 27, 2012 knee MRI showed progressive maceration of the lateral meniscus and chronic quadriceps tendinosis. Dr. Diesfeld opined that the treatment Petitioner received had been medically necessary and appropriate.

On June 10, 2013, Petitioner saw Dr. Schafer for a second opinion regarding his right knee. Dr. Schafer did not recommend further surgery, instead suggesting Petitioner undergo a repeat FCE and be given permanent restrictions. On August 19, 2013, Dr. Schafer reported Petitioner's FCE showed he was only able to lift up to 25 lbs. and push up to 30 lbs. Dr. Schaffer recommended Petitioner be given permanent restrictions per the FCE, and he discharged Petitioner from care at MMI.

Petitioner testified that he requested light duty work from Respondent In & Out, but they were unable to offer him any which would accommodate his restrictions. Petitioner has not worked since his accident. Petitioner did not know who Ullico was; but he acknowledged that for 11 months following his accident, he received weekly benefit checks from them.

Ariel Hershkovich testified that he was the owner and president of Respondent, In & Out Moving and Storage. He stated that "Novestaff" was an employee leasing company which processed his company's payroll and took care of the company's workers' compensation. Mr. Hershkovich received and paid bills from Novestaff, which included the costs of that insurance. After Petitioner's work accident, Ullico Casualty Company paid benefits to Petitioner. Mr. Hershkovich testified that he found out about Petitioner's accident when he received a letter that there was "a mistake I believe between Ullico paying this."

Mr. Hershkovich testified that he never learned that In & Out Moving and Storage was ever without workers' compensation coverage for its employees. He believed his company had coverage at all times, because he did not recall receiving a letter from the Illinois Commerce Commission (ICC") advising him otherwise. He testified that he would have received such a letter from the ICC, if his company did not have insurance.

Conclusions of Law:

The Arbitrator found the IWBF was a properly named Respondent in this claim, from whom Petitioner could seek payment if Petitioner's employer failed to pay. The Arbitrator also found that Petitioner sustained a serious right knee injury, and that Petitioner's permanent restrictions prevented him from returning to his previous job. The Arbitrator awarded Petitioner 35% loss of use of the right leg under §8(e); but also, 20% person as a whole under §8(d)2 for a loss of trade.

Respondent IWBF's primary claim of error is that it should not have been named a Respondent in this claim because it believed In & Out Moving and Storage had workers' compensation insurance which covered Petitioner on his date of accident.[2] It cites Mr. Hershkovich's testimony and the fact that Petitioner received benefits from Ullico Casualty Company for approximately 11 months.

The Commission disagrees and finds the most persuasive evidence on this issue to be the Certification from the National Council on Compensation Insurance ("NCCI"). That certification showed that In & Out Moving and Storage did not have workers' compensation insurance in effect on June 25, 2010. Further, the NCCI certification for *Novestaff Services Group* – the company which paid Petitioner his wages on behalf of In & Out Moving and Storage in 2010 – did not have a workers' compensation policy in effect on Petitioner's date of accident. While the NCCI certification did show that *Novestaff Resources Group* had a policy in effect on June 25, 2010, that company is a different entity than *Novestaff Services Group*. Also, Mr. Hershkovich admitted to receiving a letter notifying him that Ullico paying Petitioner benefits had been a mistake.

Additionally, he offered no documentary evidence at arbitration to support his belief that either In & Out Moving and Storage, or *Novestaff Services Group*, had workers' compensation coverage for employees on June 25, 2010. He did not offer into evidence a copy of an insurance policy, a Certificate of Insurance, or even a Declarations page to support his testimony. Mr. Hershkovich admitted he never saw a copy of a policy purporting to cover his company, and he did not know which names might have been on any such policy.

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[2] Respondent claimed the Arbitrator improperly ruled that, "The Injured Workers' Benefit Fund ("IWBF") *is liable* for payment to Petitioner." Actually, the Arbitrator found that, "Petitioner *is eligible* for IWBF payments in the event Respondent fails to pay the final award due to Petitioner." *(Emphasis added.)*

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Considering the record as a whole, the Commission finds that Respondent, In & Out Moving and Storage, did not have workers' compensation insurance which covered Petitioner for his subject accident.

The Commission, therefore, agrees with the Arbitrator that IWBF was properly named in this claim, and that in the event Respondent fails to pay the final award due to Petitioner, he would then be eligible to seek payment of benefits from the IWBF.

Respondent IWBF's second claim of error is that claimants cannot receive both an award under §8(e) and §8(d)2 of the Act for injuries sustained to the same part of the body. Petitioner does not dispute that contention. The Commission agrees, and finds Petitioner entitled an award under §8(d)2 only, for a loss of trade. However, the Commission finds it more appropriate to increase the Arbitrator's §8(d)2 award from 20% person as a whole, to 35% person as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's permanency award of 35% loss of use of the right leg under §8(e) and 20% loss of person as a whole under §8(d)2 is vacated. Respondent is ordered to pay Petitioner the sum of $337.38 per week for a period of 175 weeks, as provided in §8(d)2 of the Act, because the injury sustained caused the 35% loss of person as a whole.

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

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

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $61,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 6 2021
o-12/03/2020
MP/mcp
68

Marc Parker

Marc Parker

Barbara N. Flores

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SOSA, ELBIN
Employee/Petitioner

Case# **10WC033065**

IN & OUT MOVING AND STORAGE NOVESTAFF & IWBF
Employer/Respondent

21IWCC0036

On 4/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0226 GOLDSTEIN BENDER & ROMANOFF
DAVID Z FEUER
ONE N LASALLE ST 26TH FL
CHICAGO, IL 60602

5822 FRITZSHALL & PAWLOWSKI
STEVEN N FRITZSHALL
6584 N NORTHWEST HWY
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6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

21IWCC0036

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

Elbin Sosa

Case # 10 WC 33065

Employee/Petitioner

v.

In & Out Moving and Storage, Novestaff & IWBF

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **January 10, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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: 1) No insurance; 2) Notice to Respondent- Employer

FINDINGS

On the date of accident, **June 25, 2010**, Respondent-Employer ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $***17,543.76***, the average weekly wage was $***337.38***

On the date of accident, Petitioner was ***47*** years of age, ***married*** with ***0*** dependent children.

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

Respondent-Employer shall be given a credit of $**13,945.04** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**13,945.04,** if applicable.

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

ORDER

- The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. The Injured Workers' Benefit Fund is properly named.
- The Respondent-Employers shall determine if the outstanding medical bills awarded in this decision are still outstanding, then pay them to Petitioner pursuant to the Illinois Medical Fee Schedule as provided in Sections 8(a) and 8.2 of the Act. The expenses are detailed in attached part (j) of this decision.
- The Respondent-Employer shall pay Petitioner no additional temporary total disability benefits pursuant to §8(a) of the Act.
- Respondent shall pay Petitioner permanent partial disability benefits of **$337.38**/week for **175.25** weeks, because the injuries sustained caused **35% loss of use of the right leg, and 20% loss of use of a person as a whole,** as provided in Section **8(d)2** and **8(e)** of the Act.

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

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

Signature of Arbitrator

03-29-19
Date

ICArbDec

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ARBITRATOR'S FINDINGS OF FACTS

Testimony of Petitioner

Petitioner testified his full name is "Elbin Sosa Valenzula," was employed by Respondent, In & Out Moving and Storage ("In & Out") as a mover and foreman. In & Out is a moving company that specialized in moving customers from one residence to another and is owned by Ariel Herskovitz, who resides in Florida. Petitioner was responsible for moving furniture and other items, driving the moving truck, and supervising other movers. Petitioner's supervisor was Enrique Plata. Petitioner testified that his paychecks came from Novestaff, after he submitted his weekly hours to Enrique. A W-2 from Novestaff Services Group was submitted by Petitioner for the tax year of 2010. (PX #3). According to the W-2, Petitioner received earnings totaling $3,350.60 in the year 2010.

On June 25, 2010, Petitioner was at a job-site moving a customer from one residence to another. Petitioner testified that he was pulling a big dresser on a staircase when the dresser fell on him. Petitioner experienced immediate pain in his right knee. He testified that he called Enrique and told him that a dresser fell on him while at a jobsite. Enrique told Petitioner to drive the moving truck while the rest of the crew finished the job. Petitioner was unable to complete the job, and had a friend drive him to the emergency room at Swedish Covenant where he gave a consistent history of the accident.

In & Out submitted a document stating that Petitioner quit his job on the day of the accident. (In & Out Ex. #1)

Petitioner testified that he underwent two surgeries on his right knee, followed by physical therapy. He was given the authority to return to work "light duty" at some point, but In & Out had no light duty work available. Petitioner was told to come back when he was able to return to work full duty.

Petitioner testified that he had a prior injury to his right knee, for which he was instructed to use a cane. He was not using the cane on the date in question because he was unable to do his job and use it at the same time.

Petitioner testified he received temporary total disability checks from June 25, 2010 through September 9, 2011. He submitted three check stubs (See PX #21, PX #22, and PX #23). All three checks have the payee listed as Elbin Sosa, and contain the name Ullico Casualty Company, with an address in Washington, DC. *Id.* The checks have a note stating "temporary total benefits," and have the employer listed as "In & Out Moving." *Id.* The first check stub submitted is dated June 1, 2011, for a total of $239.19. (PX #21). The second check submitted is dated August 10, 2011, # a total of $2,474.12. (PX #22). There is a note on this check stating"11 weeks @ at $224.92." *Id.* The last check stub submitted by Petitioner is dated September 9, 2011 in the amount of $224.92. (PX 23). The Arbitrator takes judicial notice that Ullico Casualty Company is insolvent and went into liquidation on May 30, 2013. (Arb. Ex. #3) The Petitioner also stated that he received TTD checks until the Section 12 exam with Preston Wolin on March 1, 2013, Thereafter, he received social security disability payments.

Testimony of Ariel Herskovitz

Ariel Herskovitz testified that he is the president of In & Out Moving and Storage and has owned it since 1994. He testified that the company is still operating and that he runs it from Florida, where he currently resides. In 2010, when the alleged accident occurred, Mr. Herskovitz employed Novestaff to process payroll, and provide workers' compensation insurance, but he produced no contract to corroborate this statement. In 2010, he employed Enrique Plata as a dispatcher/operations manager for In & Out.

Mr. Herskovitz testified that Novestaff's workers' compensation policy provided coverage for In & Out, but he produced no written agreement corroborating this statement.

Mr. Herskovitz stated that Novestaff used a company named Ullico to administer payroll and workers' compensation insurance. He did not know what business name was on the workers' compensation policy.

Mr. Herskovitz testified that he learned of Petitioner's alleged accident when he received a letter

regarding this current court case. He was not informed of the alleged accident by Mr. Plata or Petitioner, and Petitioner voluntarily quit on June 25, 2010 (the date of the accident). A separation form was signed by Enrique Plata on August 24, 2010. (In & Out RX #1) On the form, it admits that Petitioner was an employee of In & Out, but also stated that "employee expressed not continuing working for the company." The Arbitrator notes that it is not signed by the Petitioner: it is not an agreement. In contrast, Petitioner denied quitting his job during his testimony.

Medical Treatment

Petitioner was seen at Swedish Covenant Hospital on June 25, 2010 and gave a consistent history of the accident. (PX #12) He complained of a twisted knee while working as a mover at 9:30 a.m.

The next day, Petitioner followed up with Dr. G. Klaud Miller at Windy City Orthopedics and Sports Medicine on July 16, 2010. (PX #16). Petitioner complained of aches, pain, and soreness in the right knee. *Id.* He reported that the pain was constant all day long. *Id.* Dr. Miller ordered an MRI of the right knee, and Petitioner was to remain off work until he was able to be re-evaluated in two weeks. *Id.*

Petitioner underwent an MRI of the right knee on July 28, 2010, which revealed a tear in the body and posterior horn of the medial meniscus. *Id.* Petitioner subsequently underwent a right knee arthroscopy on August 9, 2010 with Dr. Miller. *Id.* Petitioner continued to follow up with Dr. Miller and noted that he was still having pain in the right knee. *Id.* Petitioner underwent a second MRI on the right knee, which revealed a diffuse tear/maceration anterior horn lateral meniscus and chondromalacia patella. *Id.* Petitioner followed up with Dr. Miller on October 12, 2010, and he recommended a second surgery on the right knee. *Id.*

On November 12, 2010, Petitioner underwent a second surgery, an arthroscopic partial lateral meniscectomy and chondroplasty of the trochlea. *Id.* Petitioner followed up with Dr. Miller on November 16, 2010, and Petitioner was ordered to continue with the home exercise program, and he was permitted to

use crutches. *Id.* On December 7, 2010, Petitioner once again saw Dr. Miller, who ordered four weeks of physical therapy for three times per week. *Id.*

Petitioner continued to follow up with Dr. Miller, and on February 22, 2011, complained of continued pain in his knee while walking up stairs to his second-floor apartment. *Id.*

On March 4, 2011, Petitioner underwent a functional capacity evaluation ("FCE") at Athletico. (PX #13) Petitioner was found to demonstrate abilities in the medium physical demand level, except for lifting floor to knuckle, which placed him in the light physical demand level. *Id.* The therapist noted that there were minor inconsistencies regarding the accuracy/reliability of the subjective reports of pain, but Petitioner gave a full effort. *Id.* The therapist opined that Petitioner was not able to return safely to his previous job as a mover. *Id.*

Petitioner next saw Dr. Miller on April 19, 2011. *Id.* He continued to complain of pain while walking, standing, and constant swelling. *Id.* Dr. Miller recommended that Petitioner continue to undergo physical therapy and complete home exercises. *Id.* Petitioner followed up with Dr. Miller on May 17, 2011, at which time he reported that he did not feel like he was getting any better. *Id.* Dr. Miller recommended a repeat FCE to determine maximum medical improvement ("MMI") status.

At this point in time, there is an inexplicable 14-month gap in medical treatment. However, it should be noted that up to this point, Petitioner admitted that virtually all the medical bills and he had been paid he received his TTD benefits. Ullico was acting in good faith.

On July 2, 2012, Petitioner saw Dr. Eric Ruble, (DC) at H & M Medical for chiropractic treatment for his knee. (PX #4). H & M's intake form indicates that the Petitioner was referred to their office by Petitioner's attorney. (PX #8(a)) Dr. Ruble provided treatment to the Petitioner and referred him to Dr. James Diesfeld, at Chicago Pain Medicine Center, for pain management in the form of multiple knee

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injections. (PX #8(a) & (b)) Petitioner received narcotic medications and creams.

Drs. Ruble and James (DC), provided chiropractic treatment at H&M and have an outstanding medical bill of $21,850.41. (PX #5)

Dr. Diesfeld, who provided multiple knee injections (19+) has an outstanding medical bill of $25, 430.95 and would eventually prescribe a third knee surgery, which was never performed. (PX #9)

Surprisingly, a respondents' IME report authored by Dr. Preston Wolin dated March 1, 2013 is in the H & M medical records. (PX #4) It states that the Petitioner's ongoing complaints appear to be exaggerated. In his opinion, neither the chiropractic physical therapy with Dr. Ruble nor the pain management with Dr. Diesfeld was reasonable or necessary. Dr. Wolin reviewed medical records, a surveillance video and examined the Petitioner's knee. Afterwards, he did not believe the Petitioner would benefit from future medical care. As far as he was concerned, the Petitioner was at maximum medical improvement or MMI. Finally, an FCE was recommended. (Id.)

Dr. James (DC) wrote a prescription referral for the Petitioner to see Dr. David Schafer (orthopedic specialist) on May 22, 2013. Petitioner had been encouraged to see Dr. Schafer since October 2012, but he had not done so. In any event, Dr. Schafer examined the Petitioner on June 10, 2013 and thought most of Petitioner's pain came from arthritis and his biggest problem was the 50-lb. weight gain since his surgery. He did not recommend further treatment and thought an FCE was in order. He expressed concerns about the injections. (PX #6) Later, after the FCE, Dr. Schafer stated he adopted the results and stated that the Petitioner was at MMI. (PX #6)

The second FCE apparently stated Petitioner could not lift over 25 lbs., no bending, squatting, kneeling or crawling, rare stair use and no pushing or pulling over 30 lbs. (PX #6) The results are like the first FCE. However, the second FCE is not part of the court file. Petitioner applied for social security disability benefits and won.

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CONCLUSIONS OF LAW

A. Was Respondent-Employer In & Out Moving and Storage operating under and subject to the Illinois Workers' Compensation Act or Occupational Diseases Act?

Petitioner testified that he was employed by Respondent-Employer, In & Out Moving and Storage as a mover and foreman in June 2010. He further testified that the Respondent-Employer was a moving company engaged in the business of moving furniture and other household items from one residence to another. His work as a mover involved the use of a truck. Based upon the automatic coverage provisions of Section 3 of the Act, the Arbitrator finds that the Petitioner has established by a preponderance of the evidence that on June 25, 2010, the Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act.

B. Was there was an Employee-Employer relationship?

This Arbitrator finds an employee-employer relationship did exist between the Petitioner and In & Out. The law in Illinois provides no specific litmus test for determining whether an employer-employee relationship exists. Rather, such a relationship, if one exists, must be inferred from the conduct of the parties. While, the right to control work is often the primary factor in determining an employment relationship, there are multiple factors to consider in assessing the nature of the relationship between the parties. *Roberson v. Indus. Comm'n,* 225 Ill. 2d 159, 175 (2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. *Id.*

The testimony of the Petitioner and Ariel Herskovitz established that Petitioner was employed by In & Out. Respondent-Employer is not disputing this fact. Petitioner testified that he worked as a mover and

foreman, and his supervisor was Enrique Plata. As the foreman, Petitioner was responsible for moving furniture and other items, driving the moving truck, and supervising other movers. Petitioner received paychecks from Novestaff on behalf of In & Out. A W-2 from Novestaff Services Group was submitted by Petitioner for the tax year of 2010. (PX #3). According to the W-2, Petitioner received earnings totaling $3,350.60 from Novestaff, Inc. in the year 2010. He submitted his hours on a weekly basis to Enrique. He testified that he did not receive payroll checks directly from In & Out.

The Arbitrator finds that by applying the *Roberson* factors, the Petitioner has established by a preponderance of the evidence that on June 25, 2010, an Employee-Employer relationship existed between the Petitioner and Respondent-Employer In & Out Moving and Storage.

There is not enough evidence in the record to establish that Novestaff was a co-employer or that a loaning/borrowing relation was created by the two. Petitioner consistently told his medical care providers that his employer was In & Out Moving and Storage. This is what he put on his original application for adjustment of claim, it is what he told his doctors and it's also what he testified to in court. In & Out's sole exhibit at trial admits he was an employee of theirs. (In & Out Ex. #1) It is of no real consequence that Novestaff initially paid out on the claim. That decision may have simply been a series of clerical errors, misunderstandings or misrepresentations.

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

On June 25, 2010, Petitioner was at a residence moving a customer out of an apartment with stairs. Petitioner was pulling a big dresser on a staircase when the dresser fell on him. Petitioner experienced immediate pain in his right knee. He testified that he called Enrique Plata and informed him of the alleged accident. He told Enrique the dresser fell on him, and Enrique told him to finish the job. Petitioner was unable to complete the job, and had a friend drive him to the Swedish Covenant emergency room.

The Arbitrator finds that the Petitioner has established by a preponderance of the credible evidence

that on June 25, 2010 he sustained an accidental injury which arose out of in the course of his employment by Respondent-Employer since the Swedish Covenant medical records corroborate Petitioner's story.

D. What was the date of the accident?

See findings of this Arbitrator in "C" above.

Based upon the testimony of the Petitioner and the medical records from the emergency room, the Arbitrator further finds that Petitioner has established by a preponderance of the evidence that the date of accident was June 25, 2010.

E. Was timely notice of the accident given to the Respondent?

The testimony of the Petitioner established that Petitioner informed Enrique Plata of the accident when it occurred. He called Enrique on the telephone and told him that the dresser fell on him, and Enrique told him to finish the job. Petitioner was unable to complete the job, and had a friend drive him to the emergency room. Petitioner also testified that after his surgery, when he was authorized to return to work light duty, he came back to work and was told by Mr. Herskovitz that there was no light duty available.

Respondent-Employer In & Out disputed the fact that timely notice was given. Mr. Herskovitz testified that he was not notified of Petitioner's accident when he received a letter for this court case. He did not provide a date of this letter. The Arbitrator finds this testimony to not be credible based on the undisputed fact that Petitioner received temporary total disability from Ullico on behalf of In & Out for 13 weeks for the following periods:

PX #21	05-21-11 to 05-27-11	one week
PX #22	05-28-11 to 08-12-11	eleven weeks
PX #23	09-04-11 to 09-10-11	one week

All three checks have the payee listed as Elbin Sosa, and contain the name Ullico Casualty

Company, with an address in Washington, DC. *Id.* The checks have a note stating "temporary total benefits," and have the employer listed as "In & Out Moving." *Id.* Further, Petitioner's first two surgeries were paid. Petitioner testified that he never received a bill. Ullico would have never paid out on the claim in a timely manner if notice was in dispute in 2010.

The Arbitrator finds that the Petitioner has established by a preponderance of the evidence that he provided Respondent-Employer with timely notice of the accident as defined by the Act.

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

Petitioner testified that on June 25, 2010, he injured his right knee when a dresser fell on him while at work. Medical records establish that Petitioner was seen at Swedish Covenant Hospital on June 25, 2010. (PX #12). He complained of a twisted knee while working as a mover at 9:30 a.m. *Id.* He reported pain at the sides of his knee and decreased range of motion. *Id.*

Petitioner underwent an MRI of the right knee on July 28, 2010, which revealed a tear in the body and posterior horn of the medial meniscus. *Id.* He subsequently underwent right knee arthroscopy on August 9, 2010. *Id.* Then a second surgery: an arthroscopic partial lateral meniscectomy and chondroplasty of the trochlea on November 12, 2010. *Id.* Both were performed by Dr. G. Klaud Miller at Swedish Covenant. (PX #16)

Following surgery, Petitioner completed physical therapy and a functional capacity evaluation ("FCE") at Athletico on March 4, 2011. (PX #13) Petitioner was found to demonstrate abilities in the medium physical demand level, except for lifting floor to knuckle, which placed him in light physical demand level. *Id.* The therapist noted that there were minor inconsistencies regarding the accuracy/reliability of the subjective reports of pain, but the Petitioner gave a full effort. *Id.* The therapist opined that Petitioner was not able to return safely to his previous job as a mover. *Id.* In summary, Petitioner was able to return to work, but not as a mover.

Petitioner continued to follow up with Dr. Miller, who recommended that Petitioner continue to undergo physical therapy and complete home exercises. *Id.* On May 17, 2011, Petitioner reported that he did not feel like he was getting any better and Dr. Miller recommended a repeat FCE. *Id.*

From May 17, 2011 to July 2, 2012, there was an inexplicable 14-month gap in medical treatment. There is some evidence that Petitioner treated at Centro Medico, but those records are not in evidence. (PX #8(a))

On July 2, 2012, Petitioner saw Dr. Eric Ruble, D.C. for evaluation after being referred there by his attorney. (PX #4) Petitioner underwent chiropractic knee treatment with Drs. Ruble and James until March 22, 2013, when the Petitioner was finally referred to Dr. David Schafer, an orthopedic surgeon. (PX #4)

On July 18, 2012, Dr. Ruble referred the Petitioner to Dr. James Diesfeld from Chicago Pain Medicine Center (pain management) who subsequently found the Petitioner to be at MMI on August 20, 2012. (PX #8(b))

Soon afterwards, Petitioner reaggravated his right knee after mowing the lawn and returned to Drs. Diesfeld and Ruble. The Arbitrator notes the Petitioner lives in a Ravenswood apartment complex. Most tenants are not required to mow the parkway. The Petitioner then underwent a series of injections, therapy and pain medication. (PX #8(b))

Dr. Diesfeld's office was notified that no further benefits would be paid by Respondent on or about December 12, 2012, as Petitioner had reached MMI. *Id.*

Respondent obtained a Section 12 examination with Dr. Preston Wolin on March 1, 2013. Dr. Wolin examined the Petitioner and concluded that Petitioner was exaggerating his symptoms and that pain management had not been reasonable or necessary. There was no need for repetitive injections to the

arthroscopic portal performed by Dr. Diesfeld. There was no need for the ongoing treatment with the multiple medications being given to the patient. There was no need for further physical therapy. Finally, Petitioner was not a surgical candidate. (PX #4)

At trial, Petitioner stated his TTD benefits and further medical treatment were denied after his exam with Dr. Wolin.

Dr. Diesfeld prescribed a new MRI on October 25, 2012 (PX #8(b)) and later recommended a third surgery on November 15, 2012. *Id.*

On October 27, 2012, he underwent another right knee MRI, which revealed diffuse attenuation of the lateral meniscus, but there was no tear. *Id.* There was no tear of the ACL. Dr. Diesfeld noted that Petitioner was at MMI on August 30, 2012, but then had an acute re-exacerbation. *Id.*

Petitioner was evaluated by Dr. David Schafer at Dr. James request on June 10, 2013. (PX #6) He reviewed the recent MRI, examined the Petitioner and stated no further surgery was warranted. Petitioner's problem was mostly arthritis and weight gain. *Id.* He did not see significant tearing of the menisci. Finally, he recommended and FCE and permanent restrictions. *Id.*

A second FCE was scheduled with Dr. Pandya on May 28, 2013. It may have been performed, but that report was not entered into evidence at trial. However, it reportedly released Petitioner to return to work at medium duty. (PX #8(a)) Petitioner was awarded medicare disability benefits. *Id.*

Dr. Schafer followed up with the Petitioner on August 19, 2013 and stated an FCE had been performed, which showed that Petitioner is only able to lift up to 25 lbs. and cannot push or pull more than 30 lbs. No stooping, kneeling or crawling. *Id.* Nothing more could be done. (PX #6)

In reviewing the entire record, the Arbitrator finds that Petitioner reached MMI after the first FCE on March 4, 2011. The Arbitrator finds that a fourteen-month gap in treatment effectively extinguishes any further claim for workers' compensation benefits, even though the Petitioner was probably paid benefits after this date. Further, Dr. Wolin, respondent's section 12 examiner, supports this position and states

Petitioner needed no further treatment. Dr. Schaefer, a treater, also stated no further surgery was necessary. The record also supports an intervening, superseding injury when Petitioner was mowing the lawn in the Summer of 2012. Finally, the second FCE, performed two years later in May of 2013 was never put into evidence and does not appear to be significantly different than the original one performed by Athletico.

The Arbitrator notes that the baseline ability for Petitioner right knee prior to the accident is unclear. The medical records state he underwent surgery in 1997 and there is some suggestion in the record that he used a cane prior to the accident.

G. What were the Petitioner's earnings?

Petitioner presented no testimony regarding his hourly or weekly salary. He presented no testimony regarding the number of hours he worked. However, he submitted check stubs from TTD payments, which came from Ullico. Petitioner alleges that his earnings during the year preceding the injury were $18,655.00, with an average weekly wage of $358.75. According to the W-2 Petitioner submitted for Novestaff, Petitioner received earnings totaling $3,350.60 from Novestaff, Inc. in the year 2010. Petitioner also submitted check stubs from his TTD checks that came from Ullico from June 25, 2010 through September 9, 2011. He submitted three check stubs (See PX #21, PX #22, and PX #23). All three checks have the payee listed as Elbin Sosa, and contain the name Ullico Casualty Company, with an address in Washington, DC. *Id.* The checks have a note stating "temporary total benefits," and have the employer listed as "In & Out Moving." *Id.* The first check stub submitted is dated June 1, 2011, for a total of $239.19. (PX #21). The second check submitted is dated August 10, 2011, for a total of $2,474.12. (PX #22). There is a note on this check stating"11 weeks @ at $224.92." *Id.* The last check stub submitted by Petitioner is dated September 9, 2011 in the amount of $224.92. (PX #23). Based on the credible evidence of payment of temporary total disability payments, this Arbitrator finds that Petitioner had an average weekly wage of $337.38, which the parties appear to agree upon.

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

The testimony of the Petitioner as well as the emergency room records, established that the Petitioner's date of birth is August 18, 1962 making him 47 years of age on the date of accident. The Arbitrator finds that Petitioner was 47 years-old on the date of accident.

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

Petitioner's medical records establish that he was married at the time of the accident. (PX #13) The Athletico FCE questioner filled out by the Petitioner in his own hand states that he is "casado" or married. Align Insurance paid for the FCE. *Id.* Petitioner wrote that his wife's name was "Blanca" when he treated with Dr. Diesfeld on July 18, 2012. (PX #8(a)) Petitioner's original application for adjustment of claim states that he was married. Petitioner was married at the time of the accident.

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

The Arbitrator notes the fourteen-month treatment gap in the records and adopts the medical conclusions of Dr. Preston Wolin and further finds that Petitioner was at MMI on March 4, 2011. (PX #13) As a result, no medical bills are awarded after that date. The following bills are awarded, pursuant to the fee schedule:

PX # 7	Integrity – Dr. Schaefer	$345.00
PX #11	Crutches	$35.22
PX #14	MRI	$2,100.00

The Arbitrator notes that PX #10 – are prescription medicine payments that appear to relate to another claimant: not Elbin Sosa. Further, they are not itemized and cannot be awarded.

K. Is the Petitioner entitled to any prospective medical care?

The Petitioner did not request prospective medical care and is not awarded such.

L. What temporary total disability (TTD) benefits are in dispute?

Petitioner alleges he is entitled to TTD benefits from June 25, 2010 through March 3, 2014. (Arb. Ex. #1). However, the Arbitrator is not confident of the amount of weekly benefits he received. It appears from the record that Petitioner was probably paid weekly benefits, at least until September 10, 2011. (PX #23) It seems that Ullico paid all of his medical benefits up until this time as well. Petitioner's testimony about his TTD benefits seemed vague and contradictory.

After his first FCE with Athletico on May 4, 2011, Petitioner did not seek medical treatment for over fourteen months. The claim fell into abyance and no additional weekly benefits are awarded. While it is true the Dr. G. Klaud Williams stated on that Petitioner needed an additional FCE, there was no follow through for an extended period. Petitioner gave no accounting for activities during the treatment gap and Ullico appeared to be acting in good faith until they went bankrupt. Their attorney withdrew on November 13, 2014. Finally, Petitioner's medical condition never really changed after the first FCE on May 14, 2011. Dr. Schaefer did not see a new tear on the last MRI and no additional surgery was warranted.

As a result of the above, no additional TTD benefits are awarded.

M. Is Respondent due any credit?

The Petitioner has established by a preponderance of the evidence, however, that the Respondent-

Employer has paid at least $13,945.04 in TTD, $0 TPD, $0 maintenance benefits and offered no group health insurance. Based upon this, the Arbitrator finds that Respondent-Employer is entitled to a credit in the amount of $13,945.04.

N. Is Respondent Injured Workers' Benefit Fund liable for payment to Petitioner?

Petitioner submitted a certification of no insurance dated May 17, 2018 stating that neither Novestaff Services Group nor In & Out Moving and Storage, Inc. maintained workers' compensation insurance on the alleged date of accident, June 25, 2010. (PX #2)

Ariel Herskovitz's testimony that In & Out had workers' compensation insurance was not very credible. One must ask: how does one engaged in the business of moving and storage not know the exact the terms and conditions of its workers' compensation coverage? These events are memorialized with documentation and none were presented to clarify the matter. As a result, the negligence provisions of Section 4(d) of the Act apply to In & Out Moving and Storage, unless it can later prove it was diligent.

Since, neither In & Out nor Novestaff had workers' compensation insurance (PX #2), and Petitioner properly joined the State Treasurer as a party respondent on the amended application (50 Ill. Adm. Code 7020.20) and served a copy of the amended application on the Treasurer, then provided proper notice of the proceedings, the Arbitrator finds that Petitioner is eligible for IWBF payments in the event Respondent fails to pay the final award due to Petitioner.

Was adequate and proper notice of hearing given to the Respondent-Employer?

On the date of hearing, Ariel Herskovitz, who is the owner of In & Out Moving and Storage, was present, and represented by counsel. No one from Novestaff was present, and the hearing proceeded *ex parte* against this party. Petitioner introduced into evidence correspondence from Petitioner's attorney's office sent via certified mail to the Respondent-Employer Novestaff's addresses including the addresses

filed with the Secretary of State registered agent for Novestaff (Group PX #20).

Based on the above, the Arbitrator finds that the Petitioner has established by more than a preponderance of the evidence that the Respondent, Novestaff, had adequate and timely notice of the hearing.

O. What is the nature and extent of the Petitioner's injury?

As detailed above in Sections "F" and "J" Petitioner was diagnosed with a medial meniscus tear of the right knee. (PX #16) He subsequently underwent two surgeries, and a course of physical therapy, and injections. He has permanent restrictions and never returned to work. This Arbitrator notes that permanent and total disability is an issue in this matter, due to Petitioner's failure to return to work. However, neither of Petitioner's FCEs stated that he was permanently and totally disabled, and no doctor has stated it. While it is true that Respondent failed to provide vocational rehabilitation services, it is also true that Petitioner was incommunicado for fourteen months and did not present any evidence of his own job search. There is no evidence in the record of the Petitioner's occupational skills or education levels. Petitioner has applied for social security disability benefits, indicating that he has taken himself out of the labor market. As a result, the Petitioner does not qualify for a permanent and total disability award, but the Arbitrator does acknowledge that he has a significant permanent right leg injury.

There are three ways that a claimant can establish permanent total disability, namely by a preponderance of medical evidence; by showing a diligent but unsuccessful job search; or by demonstrating, that, because of his age, training, education, experience, and condition there are no jobs available for a person in her circumstances. *ABB C-E Servs. v. Indus. Comm'n*, 316 Ill. App. 3d 745, 750 (2000).

The first way for Petitioner to prove permanent and total disability is by providing medical proof establishing he cannot work. *Cont'l Drilling Co. v. Indus. Comm'n of Illinois*, 155 Ill. App. 3d 1031 (1987).

This burden rests with the Petitioner. *Ceco Corp. v. Indus. Comm'n*, 95 Ill. 2d 278, 287 (1983). There is no black-line quantum of medical evidence that constitutes proof of permanent total disability, but the Illinois Supreme Court has ruled that two medical experts' opinions constitute such proof. *Id.*

In the case at bar, Petitioner presented evidence that he *can* work. On August 30, 2012, Dr. Diesfeld placed Petitioner at MMI, and authorized him to return to work. (PX #8). Petitioner has provided no opinions of medical experts that say otherwise.

The second way for Petitioner to prove permanent and total disability is by showing a diligent but unsuccessful job search. *ABB* at 750. In this case, Petitioner has not provided any proof a diligent job search. He presented no testimony or other evidence that he conducted any sort of job search. This Arbitrator finds that Petitioner failed to sustain her burden of proving a diligent but unsuccessful job search in ultimately proving that he is permanently and totally disabled.

The third way for Petitioner to prove permanent disablement is by showing, by preponderance of the evidence, that she is so handicapped that he cannot be employed regularly in any well-known branch of the labor market. *Valley Mould & Iron Co. v. Indus. Comm'n of Illinois*, 84 Ill. 2d 538, 546–47, (1981).

The most recent cases making an odd-lot determination on this factor found that there is no stable market for a person of the claimant's age, skills, training, and employment history have required evidence from a rehabilitation services provider or vocational services. *Westin Hotel v. Indus. Comm'n of Illinois*, 372 Ill. App. 3d 527, 530, 545 (2007). Here there is no such evidence. In the case at bar, Petitioner presented no evidence of a labor market survey, or vocational assessment. Petitioner failed to present any testimony or other evidence of any of his skills or training outside of the moving company industry. In fact, Petitioner presented proof of a valid Illinois driver's license, which expires August 18, 2020. (PX #17). Petitioner testified that he drives a Toyota 4Runner. He also testified that he used public transportation to attend the hearing on this matter. Clearly,

21IWCC0036

Petitioner is capable of moving from place to place independently and is capable of transporting himself to work.

As Petitioner failed to prove permanent, total disability under all three options allowed by law, an award of permanent partial disability is the appropriate award in this case.

Petitioner testified that he is currently not employed. Petitioner provided no job search logs. Petitioner's work condition does not preclude him from working in some capacity. Petitioner underwent an FCE placing him capabilities at medium - light physical demand level. (PX #8). The second FCE is not in the record; it is missing. Nevertheless, it seems similar enough to the original one.

Based upon the testimony of the Petitioner and other credible evidence, the Arbitrator finds that the Respondent shall pay the Petitioner permanent partial disability at the rate of $337.38 per week for 175.25 weeks because the injury sustained caused 35% loss of use of the right leg as provided in section 8(d) of the Act and 20% loss of use of a person as a whole for the loss of occupation under section 8(d)(2).

Arbitrator Kurt Carlson

03-29-19
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Fernando Verduzco,

Petitioner,

vs. No. 17 WC 8585

Wal-Mart Stores, Inc., d/b/a Sam's Club,

21IWCC0037

Respondent.

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

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

Petitioner, a 29-year-old lead supervisor for Respondent, injured his low back on October 22, 2016 while pushing a row of shopping carts outside the store. As a result of his injury, he required an L5-S1 microdiscectomy, which was performed by Dr. Bagan on February 24, 2017. Prior to his work accident, Petitioner had been diagnosed with multiple herniated lumbar discs, though he had not required treatment for that condition in years. At the time of his October 22, 2016 accident, Petitioner had been working without restrictions.

After Petitioner's February 24, 2017 surgery, his pain and radiating symptoms continued. He received further treatment consisting of physical therapy and lumbar injections. Petitioner

testified that he wishes to continue receiving the treatment being recommended by his surgeon, Dr. Bagan, and his pain management physician, Dr. Yaacoub.

Petitioner was examined by Respondent's expert, Dr. Lami, on two occasions. At his first exam on October 22, 2017, Dr. Lami opined that the lumbar spine treatment Petitioner had received had been reasonable and related to his October 22, 2016 accident. At Dr. Lami's second examination on September 24, 2018, he found that Petitioner was at MMI, based upon: Petitioner's medical findings; the fact that he was gainfully employed on a full time basis, and the fact that he was able to manage his pain with over the counter medications. Dr. Lami opined that Petitioner did not require further treatment or surgery, because neither would improve his functionality or reduce his residual pain.

The Arbitrator found that Petitioner proved his current condition of ill-being was causally related to his accident, and awarded him $5,334.08 for unpaid medical expenses and the prospective care recommended by Dr. Bagan and Dr. Yaacoub. In addition, the Arbitrator found Respondent liable to pay Petitioner a $10,000.00 penalty under §19(l), for its failure to timely pay $2,179.00 in medical bills incurred by Petitioner for treatment received prior to Dr. Lami's first exam, which treatment Dr. Lami agreed was reasonable and necessary.

The Arbitrator acknowledged that Petitioner failed to produce copies of any letters to Respondent in which he demanded payment of any medical bills. However, the Arbitrator considered the reference to an insurance carrier in some of the bills offered into evidence at arbitration, sufficient proof justifying the consideration of §19(l) penalties.

The Commission disagrees. Section 19(l) states that,

> "If the employee has made *written demand* for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d)." *(Emphasis added.)*

A written demand for payment of medical bills is required before the consideration and imposition of §19(l) penalties. In this case, no such evidence was presented. Because the record does not contain a written demand for payment of medical bills, the Commission finds Petitioner failed to prove entitlement to §19(l) penalties. The Commission therefore vacates the award of §19(l) penalties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 4, 2019, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize the reasonable and necessary medical treatment recommended by Dr. Bagan and Dr. Yaacoub, including authorization of prescribed medication and the medial branch block pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the following medical bills, if unpaid, pursuant to the medical fee schedule, as provided in §8(a) and §8.2 of the Act:

Advocate Condell Medical Center	$2,391.00
Lake County Acute Care	$1,708.00
Midwest Diagnostic Pathology	$ 21.00
Infinity Healthcare Physicians	$1,026.00
Illinois Pain Institute	$ 172.00
Prescriptions	$ 16.08

IT IS FURTHER ORDERED BY THE COMMISSION that the award of the $10,000.00 §19(l) penalty is vacated.

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

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,400.00. 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: JAN 26 2021
o-12/03/2020
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

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

VERDUZCO, FERNANDO
Employee/Petitioner

Case# **17WC008585**

WAL-MART STORES INC D/B/A SAM'S CLUB
Employer/Respondent

21IWCC0037

On 9/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.82% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5625 GRAUER & KRIEGEL LLC
ANDREW KRIEGEL
1300 E WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

5074 QUINTAIROS PRIETO WOOD & BOYER
JULIE M SCHUM
233 S WACKER DR 70TH FL
CHICAGO, IL 60606

21IWCC0037

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Fernando Verduzco,
Employee/Petitioner

v.

Wal-Mart Stores, Inc., d/b/a Sam's Club
Employer/Respondent

Case # **17** WC **008585**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Arbitrator Jessica Hegarty**, Arbitrator of the Commission, in the city of **Waukegan**, on **July 2, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

21IWCC0037

FINDINGS

On the date of accident, **10/22/2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**35,468.68**; the average weekly wage was $**709.73**.

On the date of accident, Petitioner was **28** years of age, ***married*** with **2** dependent children.

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

ORDER

1. Respondent shall authorize the reasonable and necessary medical treatment recommended by Dr. Bagan and Dr. Yaacoub including authorization of prescribed medication and the medial branch block pursuant to §8(a) of the Act;

2. Respondent shall pay directly to Petitioner the following unpaid medical bills pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Advocate Condell Medical Center	$2,391.00
Lake County Acute Care	$1,708.00
Midwest Diagnostic Pathology	$21.00
Infinity Healthcare Physicians	$1,026.00
Illinois Pain Institute	$172.00
Prescriptions	$16.08

3. Respondent shall pay $10,000.00 to Petitioner as provided in §19(l).

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.

Jason C. Mozeta

Signature of Arbitrator

8-29-19
Date

ICArbDec19(b)

SEP 4 - 2019

BEFORE THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

FERNANDO VERDUZCO, Petitioner,	)	21IWCC0037
VS.	)	17 WC 008585
WALMART, INC. Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

This matter proceeded to hearing on October 17, 2017 in Rockford, Illinois (AX 1).

The parties stipulated the Petitioner was involved in a work-related accident that arose out of and in the course of his employment with Respondent on October 22, 2016 (Id.).

Fernando Verduzco ("Petitioner"), a 31-year-old lead supervisor employed by Wal-Mart Stores, Inc., d/b/a Sam's Club ("Respondent") in the Tire Department, testified to the duties associated with his position included stocking tires, servicing members, completing work orders and assisting throughout the store (Tr. pp.6 -88).

Regarding his accident, Petitioner testified that on October 22, 2016 he was pushing a group of shopping carts at a ninety degree angle when he felt a sharp pull and pinch in his back (Tr. p. 8- 9). After advising his manager of his pain, he went home (Tr. p. 10).

On October 24, 2016 Petitioner presented to the Advocate Condell Vernon Hills Immediate Care Center with a history of low back pain radiating down the left leg (Px. 4). Petitioner's symptoms began after pushing carts at work (Id.). The pain was exacerbated by movement, bending and walking (Id.). Work restrictions were issued and Petitioner was to follow up in two days (Id.). On October 26, 2016 Petitioner reported no improvement in his symptoms and on November 2, 2016 he complaining of worsening symptoms. Petitioner began a course physical therapy which brought only minimal relief (Id.).

On December 13, 2016 Petitioner presented to Dr. Bradley Bagan, a neurosurgeon at The American Center for Spine & Neurosurgery with a history of severe low back and lower extremity pain (Px. 5). Petitioner reported his back pain began after he twisted the wrong way moving heavy carts at work (Id.). Dr. Bagan noted oral steroid medication had brought minimal relief, and physical therapy had ceased after only four sessions due to Petitioner's ongoing back symptoms. The doctor ordered a lumbar MRI, prescribed Mobic, Norco, Cyclobenzaprine, and issued work restrictions of no lifting more than 10 lbs., and no excessive bending, stooping, or lifting. (Id.).

Petitioner returned to Dr. Bagan on January 10, 2017 after obtaining the MRI on December 27, 2016. On review, Dr. Bagan diagnosed Petitioner with a left-sided lumbar disc protrusion at L5-S1 causing severe lateral recess stenosis for which he recommended surgery (Id.).

On February 24, 2017 Petitioner underwent a hemilaminectomy for stenosis decompression, including partial medial facetectomy, foraminotomy and microdiscectomy performed by Dr. Bagan at Advocate Condell Hospital in Libertyville (Px. 5).

On March 16, 2017 Petitioner followed up with Dr. Bagan who noted the surgery brought relief of Petitioner's severe left lower extremity pain, although he complained of tingling in his toes, significant right-sided back pain, pain at the incision site, and occasional right lower extremity pain. Dr. Began refilled prescriptions for Cyclobenzaprine, Mobic, Nabumetone, and Norco, recommended a course of physical therapy and continued off-work restrictions. (Px. 5).

Petitioner continued regular follow up with Dr. Bagan and on June 15, 2017 the doctor noted persistent right-sided low back pain with associated radicular symptoms (Id.). Petitioner had completed physical therapy. Dr. Bagan expressed concern of instability due to the size of Petitioner's disc protrusion (Id.). He believed Petitioner likely experienced significant loss of disc height. Thus, a subsequent lumbar MRI was ordered (Id.).

On August 29, 2017 Petitioner followed up with Dr. Began who noted, "Since surgery, he has developed new right-sided radicular complaints as well as intermittent left-sided radicular complaints and worsening low back pain" (Id.). Dr. Bagan noted concern of instability due to the large size of the disc herniation. On review of the MRI films taken three weeks prior, the doctor noted loss of disc height and endplate Modic changes at L5-S1 with interval hemilaminectomy changes and resolution of the large protrusion along with persistent bilateral foraminal stenosis (Id.). Dr. Bagan explained Petitioner's future treatment options consisted of physical therapy and epidural injections and if those options failed a fusion surgery at L5-S1 would need to be considered (Px. 5).

Petitioner presented for consult with Dr. Chadi Yaacoub, (MD, FIPP) at the Illinois Pain Institute in Elgin on January 24, 2018 (Px. 6). Petitioner reported bilateral back pain at 8/10 in intensity since his surgery (Id.). Dr. Yaacoub documented a positive straight-leg raise test bilaterally, positive Patrick's test, and limited lumbar spine extension and flexion (Px. 6). An L5-S1 transforaminal epidural steroid injection was scheduled (Id.).

On April 2, 2018 Petitioner was discharged from physical therapy after completing 18 visits in a six week period (Px. 5). His discharge summary noted he had no change in functional status or pain complaints (Id.).

On April 13, 2018 Petitioner returned to Dr. Yaacoub complaining of low back pain radiating to his lower extremities associated with numbness, tingling and weakness. He had presented to the emergency room two days prior due to his severe back pain (Px. 6). On exam, Dr. Yaacoub again documented positive straight leg raise bilaterally, right-sided decreased sensory pinprick following L5-S1 dermatomal distributions, positive Patrick test and limited lumbar spine extension and flexion. The doctor noted the plan was to schedule L5-S1 epidural steroid injections and peripheral nerve blocks, noting he is also a candidate for lumbar medial branch blocks and possible rhizotomy. Petitioner was provided a prescription for Baclofen for muscle spasm (Id.).

On April 20, 2018 Dr. Yaacoub administered L5-S1 transforaminal epidural steroid injections and bilateral superior glutal nerve blocks. Petitioner was provided a prescription for Zanaflex and advised to stop taking Baclofen once he started the new medication (Id.).

On June 8, 2018 Petitioner returned to Dr. Yaacoub complaining of bilateral mid and low back pain on a 7-8/10 that radiates to his lower extremities bilaterally down to his feet with intermittent numbness and tingling in his toes (Id.). Petitioner described the pain as burning and stabbing. Pain was aggravated by walking and standing for prolonged periods and eased by lying down. He reported the Gabapentin was not helping and the Tramadol did not provide enough relief when he only took one tablet. (Id.). Dr. Yaacoub documented the same findings on physical exam as prior. A transforaminal epidural steroid injection and a bilateral superior cluneal gluteal nerve block was administered. Prescriptions for Tramadol and Lyrica were dispensed and Petitioner was to follow up in three to four weeks (Id.).

Upon returning to Dr. Yaacoub on June 30, 2018, Petitioner's persistent complaints of bilateral back pain, worse on the right, coupled with right-sided radicular numbness and tingling were noted. Petitioner described his lumbar pain as constant and burning, aggravated by walking and physical activity and relieved by prescription medication and hot packs (Px. 6). Dr. Yaacoub scheduled a medial branch block (Id.).

On November 9, 2018 Dr. Yaacoub noted the medial branch block had not been authorized. Petitioner reported the Lyrica helped relieve symptoms, but he could not afford it.

Petitioner has been unable to return for medical treatment since his November 9, 2018 appointment with Dr. Yaacoub because such treatment has not been authorized by Respondent.

Petitioner testified he would like to return to obtain the medical treatment recommended by Dr. Yaacoub and Dr. Bagan (Tr. p 21).

Petitioner left his job with Respondent because it was too physically demanding. He sought other employment in a less physically demanding office type job (Tr. p 20). He continues to have regular ongoing back pain. He can no longer take out the trash at home if it gets too heavy, and has difficulty carrying groceries (Tr. p 21). He testified the burning back pain radiates to his legs which prevents him from doing normal activities like participate in activities with his children as he used to (Tr. p 19).

At Respondent's request, Petitioner was examined by Dr. Babak Lami on two separate occasions, October 27, 2017 and September 24, 2018. Dr. Lami noted Petitioner's medical treatment through the time of the first examination had been reasonable and necessary and causally related to the work injury. He further opined Petitioner had not reached MMI at the time of his first examination, and that additional medical treatment was necessary. Following a course of physical therapy Dr. Lami opined Petitioner had reached MMI despite his continued lumbar symptoms.

CONCLUSIONS OF LAW

The Arbitrator found Petitioner a credible witness who presented as sincere and honest. His testimony regarding his work-related accident and subsequent complaints are corroborated by the treating medical records.

F. CAUSAL CONNECTION

The Arbitrator finds Petitioner has established that his current condition of ill-being in his lumbar back with associated radicular complaints is causally related to the uncontested work injury at issue. The Arbitrator bases this decision on the preponderence of the evidence contained in the record noting the following:

1. Petitioner's unrebutted testimony regarding his good health prior to the accident at issue is corroborated by the treating medical records and his ability to perform his physically strenuous job for Respondent before the accident;

2. Respondent's §12 examiner Dr. Lami agreed Petitioner's injuries were causally related to the work-related accident at issue and that his treatment up to the date of his first IME was causally related. Regarding Dr. Lami's opinion that Petitioner was at MMI as of April 2, 2018, the Arbitrator finds this conclusion is not factually supported by the evidence contained in the record including the diagnostic studies, treating medical records and Petitioner's credible testimony;

3. Following the accident and subsequent surgery, Petitioner developed new right-sided radicular complaints as well as intermittent left-sided radicular complaints and worsening low back pain. After review of post-surgery lumbar MRI films, Petitioner's neurosurgeon noted a left paracentral disc herniation versus epidural fibrosis abutting the traveling S1 nerve root, demonstrated loss of disc height, endplate modic changes at L5-S1 and persistent bilateral foraminal stenosis. Dr. Bagan noted concern about instability due to the size of the disc herniation;

4. Pursuant to Dr. Bagan's recommendation, Petitioner began treating with Dr. Yaacoub who consistently documented positive straight leg raise bilaterally, right-sided decreased sensory pinprick following L5-S1 dermatomal distributions, positive Patrick test and limited lumbar spine extension and flexion;

5. Following his surgery, Petitioner left his job with Respondent in favor of less physically demanding work.

6. Petitioner's credible testimony regarding his current condition.

Based on the totality of the evidence, the Arbitrator finds Petitioner has established his current condition of ill-being is causally related to his October 22, 2016 work injury.

J. MEDICAL BILLS & SERVICES

Based on the Arbitrator's prior findings and after reviewing the disputed medical bills and the record as a whole, the Arbitrator finds the medical bills below constitute reasonable and necessary treatment related to Petitioner's October 22, 2016 work injury.

Respondent shall pay directly to Petitioner the below listed bills pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act:

Advocate Condell Medical Center	2,391.00
Lake County Acute Care	1,708.00
Midwest Diagnostic Pathology	21.00
Infinity Healthcare Physicians	1,026.00
Illinois Pain Institute	172.00
Prescriptions (paid by Petitioner)	16.08

K. PROSPECTIVE MEDICAL CARE

The Arbitrator finds the treating medical records and opinions contained therein more compelling than the testimony Respondent's §12 examiner on this issue

Petitioner's treating neurosurgeon performed lumbar surgery to treat Petitioner's October 22, 2016 work injury. Following the accident and subsequent surgery, Petitioner developed new right-sided radicular complaints as well as intermittent left-sided radicular complaints and worsening low back pain. After review of post-surgery lumbar MRI films, Petitioner's neurosurgeon noted a left paracentral disc herniation versus epidural fibrosis abutting the traveling S1 nerve root, demonstrated loss of disc height, endplate modic changes at L5-S1 and persistent bilateral foraminal stenosis. Dr. Bagan noted concern about instability due to the size of the disc herniation, noting Petitioner may be a candidate for a fusion if conservative care fails to relieve Petitioner's symptoms. Pursuant to Dr Began's recommendation, Petitioner sought treatment Dr. Yaacoub who subsequently recommended medial branch blocks. Petitioner also reported the inability to fill a prescription for Lyrica because he couldn't afford it and has been unable to return for medical treatment since his November 9, 2018 appointment with Dr. Yaacoub because such treatment has not been authorized by Respondent.

Based on a preponderance of the evidence, the Arbitrator finds Petitioner has sustained his burden with respect to this issue.

Respondent shall authorize the reasonable and necessary medical treatment recommended by Dr. Bagan and Dr. Yaacoub including authorization of prescribed medication and the medial branch block recommended by Dr. Yaacoub.

M. PENALTIES AND/OR FEES

Respondent's §12 examiner confirmed the reasonableness and necessity of Petitioner's medical treatment through his first §12 examination on October 27, 2017. He further opined Petitioner had not reached MMI at the time of his first examination, and that additional medical treatment was necessary. Despite the opinions of Respondent's Section 12 examiner, approximately half of Petitioner's unpaid medical bills that were incurred prior to Dr. Lami's first IME, remain unpaid today.

Petitioner's current unpaid medical bills for treatment related to his work injury total $5,334.08. Of this amount $2,179.00 was for treatment rendered prior to Dr. Lami's first §12 examination, which he specifically testified was reasonable and necessary.

Respondent does not argue they acted in good faith in failing to pay any of Petitioner's medical bills. Instead, Respondent argues the Petitioner's failure to produce evidence regarding when those bills and records were presented to Respondent prior to trial should defeat their claim. While it is true the Petitioner did not produce any letters demanding specific payment from Respondent of any medical bills, the submitted bills do contain references to Respondent's insurance carrier.

Based on this record, the Arbitrator finds Respondent's failure to pay the medical expenses incurred by Petitioner before October 27, 2017 is unsupported by medical opinion and finds no good faith basis for denial. Accordingly, penalties are warranted pursuant to Section 19(l). Such penalties are in the nature of a non-discretionary late fee. *McMahan v. Industrial Commission*, 183 Ill.2d 499 (1998). The Arbitrator awards Section 19(l) penalties at the rate of $30.00 per day and in the maximum amount of $10,000.00.

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

Michael LaFond,

Petitioner,

vs. No. 13 WC 007858

George Potter Electric Co.,

21IWCC0038

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 30, 2019 is hereby affirmed and adopted.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,000.00. 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
MP/dak
68

JAN 2 6 2021

Marc Parker

Deborah L. Simpson

Barbara N. Flores

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

LaFOND, MICHAEL
Employee/Petitioner

Case# 13WC007858

GEORGE POTTER ELECTRIC CO
Employer/Respondent

21IWCC0038

On 9/30/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.86% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0274 HORWITZ HORWITZ & ASSOC
MARC A PERPER
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0000 HOLECEK & ASSOCIATES
KENNETH SMITH
PO BOX 64093
ST PAUL, MN 55164

FINDINGS

On the date of accident, **June 30, 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 $**88,649.60**; the average weekly wage was $**1,704.80**.

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

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

Respondent shall be given a credit of $**90,272.96,** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**90,272.96**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**1,136.53**/week for **91-6/7** weeks, commencing **August 4, 2011 through February 13, 2013, and March 12, 2015** through **June 3, 2015**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $**90,272.96** for temporary total disability benefits that have been paid.

Respondent shall pay to Petitioner the further sum of $**869.57** for reasonable and necessary medical services, subject to 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, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for the treatment prescribed by Dr. Fernandez; viz., bilateral revision carpal tunnel release surgery and bilateral cubital tunnel release surgery, and including all necessary preoperative, postoperative and ancillary care.

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

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

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

Arbitrator Anthony C. Erbacci

September 27, 2019
Date

SEP 30 2019

FACTS:

Petitioner was a 52-year old journeyman union electrician who became employed by Respondent in the year 2000. His job duties included installation of electrical conduit and pulling and terminating wires. The physical requirements of the work included both fine manipulation with his fingers and hands, as well as climbing, carrying, and lifting up to 75 pounds on his own and 200 pounds with assistance.

Petitioner testified that from April through July 2011, he was assigned to install conduit at a public park. He would lay the conduit in trenches and then "backfill" each trench using a shovel. Petitioner estimated that he spent about four hours each day backfilling dirt into trenches. Petitioner testified that, by the end of each workday, he was experiencing numbness and tingling in both hands and in the third, fourth and fifth fingers, radiating up into the wrists and forearms. By June 30, 2011, he could no longer tolerate these symptoms. On July 1, 2011, he notified George Potter, the owner. He continued working another few weeks thereafter.

On July 18, 2011, Petitioner sought treatment at Oak Orthopedics. There he was seen by Dr. Carey Ellis. Petitioner complained of constant pain, numbness and tingling in both hands, radiating from the third, fourth and fifth fingers up into the forearms, beginning on June 30, 2011 while shoveling dirt. He denied any neck pain. On physical examination, sensation to pinprick was decreased in the median nerve distribution. Motor strength on the left was diminished on resisted flexion and extension of the wrist. X-rays of the neck and bilateral forearms were negative. Dr. Ellis prescribed bilateral cock-up wrist splints, ordered X-rays of the neck and both forearms, and referred Petitioner to Dr. Juan Santiago-Palma, a neurologist, for an EMG, which took place on August 1, 2011. According to Dr. Santiago-Palma, the EMG revealed electrodiagnostic evidence of severe bilateral carpal tunnel syndrome.

On August 4, 2011, Petitioner returned to Dr. Ellis. On review of the EMG, Dr. Ellis diagnosed severe bilateral carpal tunnel syndrome. He referred the patient to Dr. Michael Corcoran for consideration of surgery, which would involve carpal tunnel releases. Petitioner ceased working at that time.

Dr. Corcoran saw Petitioner on August 8, 2011. Petitioner complained of "persistent difficulties with both hands," worse on the right. Physical examination revealed swelling of the dorsal right wrist with limited range of motion. Tinel's and Phalen's signs were both positive. Dr. Corcoran diagnosed "severe carpal tunnel," superimposed upon pre-existing, diffuse degenerative changes involving scapholunate advanced collapse ("SLAC"). The doctor recommended bilateral carpal tunnel releases, beginning on the right, and placed Petitioner on a restriction of left-handed work only. On August 25, 2011, Dr. Corcoran advised Petitioner to refrain from work entirely.

On September 2, 2011, Petitioner underwent surgery by Dr. Corcoran at Oak Surgical Institute consisting of an open right carpal tunnel release. Postoperatively, Petitioner complained on September 14 and 28, 2011 that no symptomatic achievement had been achieved. Dr. Corcoran advised Petitioner to remain off work during this period. On September 28, 2011, Dr. Corcoran referred the patient to Dr. Kermit Muhammed for further evaluation.

Dr. Muhammed first saw Petitioner on October 11, 2011. He complained of persistent pain, numbness and tingling in the right hand with no relief following carpal tunnel release. Dr. Muhammed explained that persistent paresthesias could be expected given the severity of the carpal tunnel syndrome noted on the EMG. Dr. Muhammed advised Petitioner to continue off work and ordered occupational therapy for the right upper extremity, followed by a left carpal tunnel release. Occupational therapy took place at Ryan Center for Hand Therapy.

Dr. Muhammed next saw the patient on November 8, 2011. He complained that no significant improvement had occurred on the right, while significant symptoms were still present on the left. Dr. Muhammed diagnosed carpal tunnel syndrome with SLAC osteoarthritis. He recommended a left carpal tunnel release with occupational therapy to be resumed postoperatively. He instructed Petitioner to remain off work.

On November 18, 2011, Petitioner complained of continued hand numbness, worse when leaning forward. Suspecting cervical radiculopathy, Dr. Muhammed advised him to continue off work and suggested a consult with Dr. Santiago-Palma to rule out neck pathology. However, insurance authorization for the Santiago-Palma consult could not be obtained.

On December 2, 2011, Dr. Muhammed again prescribed left carpal tunnel release surgery, while still recommending a cervical spine consult if authorized. He instructed Petitioner to remain off work.

On December 19, 2011, Petitioner underwent surgery by Dr. Muhammed at Oak Surgical Institute consisting of a left carpal tunnel release. By January 3, 2012, he was still complaining of severe pain, numbness and tingling in both upper extremities. Dr. Muhammed advised the patient to remain off work, ordered another round of occupational therapy, and suggested a pain consult with Dr. Santiago-Palma. Petitioner returned to Ryan Center for Hand Therapy for occupational therapy. By January 12, 2012, he was complaining of numbness radiating from both elbows.

Petitioner saw Dr. Santiago-Palma on January 13, 2012. He described pain and weakness in the bilateral upper extremities with numbness and tingling along the third, fourth and fifth digits of both hands since June 2011, which he related to repetitive strain at work. He reported no significant improvement following bilateral carpal tunnel release. On physical examination, decreased sensation was noted to light touch and pinprick along the C6 distribution bilaterally, with tenderness to palpation along the bilateral cervical paraspinals and limited range of motion of the cervical spine. Dr. Santiago-Palma diagnosed cervical myelopathy and bilateral hand numbness. He recommended a repeat EMG of the upper extremities and a cervical MRI. Dr. Santiago-Palma deferred to the opinion of Dr. Muhammed regarding Petitioner's work status. On January 27, 2012, Dr. Muhammed instructed Petitioner to remain off work until further notice.

EMG/NCV was performed on February 14, 2012 by Dr. Santiago-Palma. Sensory conduction studies of the right and left median nerves revealed prolonged latencies and decreased amplitudes. Prolonged latencies were also found on motor conduction studies of the right and left median nerves. As to the ulnar nerves, sensory conduction studies revealed prolonged latencies and decreased amplitudes in both the right and left upper extremities. Dr. Santiago-Palma diagnosed bilateral median neuropathy at the wrist, with significant improvement compared to the earlier, August 1, 2011 study. He found no electrodiagnostic evidence of cervical radiculopathy.

Of note, Dr. Santiago-Palma did not comment on the February 14, 2012 EMG finding of prolonged latencies and decreased amplitudes at the ulnar nerves bilaterally. However, Dr. John Fernandez, an orthopedic hand specialist to whom Petitioner was referred by Dr. Muhammed for further treatment on February 28, 2012, testified that the EMG finding of prolonged latencies and decreased amplitudes at the ulnar nerves bilaterally constituted an abnormal finding, consistent with bilateral cubital tunnel syndrome.

On February 28, 2012, Dr. Muhammed advised Petitioner to remain off work and referred him to Dr. Fernandez for a second opinion. Petitioner first saw Dr. Fernandez on April 7, 2012. He complained of bilateral hand parasthesias, worse on the right since June 30, 2011, secondary to backfilling trenches by hand at work, with no improvement despite bilateral carpal tunnel release surgery and occupational therapy. He denied any neck discomfort. On examination, the patient displayed some expansion and two-point discrimination to seven millimeters, normal being four to five millimeters, with irritability of the median nerve at the wrist as well as the ulnar nerve at the elbow. X-rays of the wrists were grossly normal. Dr. Fernandez diagnosed bilateral carpal tunnel syndrome status-post carpal tunnel releases, and bilateral cubital tunnel syndrome. Dr. Fernandez suggested that the lack of improvement in Petitioner's bilateral carpal tunnel syndrome might be due to the median nerves taking time to heal. The doctor also suggested that bilateral cubital tunnel syndrome might be present. He recommended that Petitioner wear extension braces at night, or that he try to sleep with his elbows extended.

Petitioner returned to Dr. Muhammed on April 10 and May 11, 2012. Dr. Muhammed recommended that the patient remain off work and continue under the care of Dr. Fernandez for definitive treatment and possible ulnar nerve transposition surgery. Thereafter, Petitioner transferred his care to Dr. Fernandez.

Petitioner next saw Dr. Fernandez on June 19, 2012. He complained of persistent, bilateral numbness and tingling of the ring and small fingers, along with bilateral numbness and tingling involving the thumb and middle finger. He rated his symptoms as 6/10, with no improvement over the past nine months. Two-point discrimination was five to six millimeters along the digits. Median nerve irritability was present at the wrist; ulnar nerve irritability was found at the elbow. Tinel's test and elbow flexion test were positive bilaterally, worse on the right. Strength was present in all major muscle groups, but with evidence of bilateral thenar atrophy, more so on the right. Swelling was present along the medial elbow and along the cubital tunnel. Dr. Fernandez diagnosed bilateral hand numbness and tingling with active carpal and cubital tunnel syndromes. He recommended conservative care for the left upper extremity using a long-arm elbow night splint at thirty degrees extension. For the right upper extremity, he recommended surgical intervention involving a right elbow cubital tunnel release with transposition of the ulnar nerve and application of nerve wrap, as well as a revision mid-to-large open carpal tunnel release. Petitioner indicated a desire to proceed with surgical intervention on the right upper extremity and conservative measures on the left, as recommended by Dr. Fernandez. The doctor placed Petitioner on work restrictions involving light duty with no more than five pounds of force utilizing the left and right upper extremities.

On July 12, 2012 and again on August 2, 2012, Dr. Fernandez wrote Respondent's claims adjuster to request authorization for the prescribed surgery.

Dr. Michael Cohen examined Petitioner at Respondent's request on September 19, 2012, pursuant to §12 of the Act. On examination, Dr. Cohen noted a positive Tinel sign over both cubital tunnels; positive elbow flexion test bilaterally; two-point discrimination at 5 mm. in all digits on the right and 5 mm. in the median distribution on the left, but with multiple errors in the ring and small fingers. Underlying SLAC wrist deformity was noted as an incidental finding. Dr. Cohen stated that the patient's subjective and objective findings did correlate; however, he opined that that the patient's complaint of upper extremity numbness was not consistent with carpal tunnel syndrome. Rather, he suggested that the findings by history and examination were suggestive of cervical radiculopathy or possibly brachial plexopathy. Dr. Cohen stated that he would be hesitant in moving forward with a repeat carpal tunnel release. Dr. Cohen further stated that the patient's symptomatology was "not exactly classic for cubital tunnel syndrome," and that "no positive electrodiagnostic findings consistent with cubital tunnel syndrome" were present. Accordingly, he did not recommend a cubital tunnel release. Instead, he proposed a chest X-ray to rule out a Pancoast tumor, and a cervical MRI to investigate whether a source of cervical radiculopathy might explain the patient's symptoms. He disagreed with Dr. Fernandez's recommendation of a cubital tunnel release with transposition of the ulnar nerve and application of a nerve wrap with revision carpal tunnel release, based on the improvement shown in median nerve function on the EMG, and questions regarding a C7-C8 cervical radiculopathy. Were the patient to require a cubital tunnel release, Dr. Cohen suggested an *in situ* release rather than a transposition. Dr. Cohen stated that the patient should be placed on a five-to-ten pound weight restriction pending his cervical MRI, and that he had not yet reached maximum medical improvement.

Dr. Fernandez referred Petitioner to Dr. Gunnar Andersson, a spinal surgeon, for a cervical spine evaluation as recommended by Drs. Cohen and Santiago-Palma. Dr. Andersson, who examined Petitioner on November 29, 2012, found it "highly unlikely that this patient's problem arises from his cervical spine." While an MRI might be warranted due to his degenerative changes, there was "nothing to suggest that the neck is the source of the patient's hand and elbow problems".

Petitioner underwent a cervical MRI on December 27, 2012 at Chicago Ridge Radiology. The MRI confirmed that Petitioner had degenerative changes at the C4 through C7 levels. Respondent's §12 examiner, Dr. Cohen, stated in a January 4, 2013 addendum that Petitioner requires treatment to the cervical spine. On January 24, 2013, Dr. Cohen stated in a second addendum that no work restrictions are warranted in relation to Petitioner's upper extremity injuries, and that he would defer to a spinal surgeon relative to whether any restrictions are appropriate in relation to the cervical spine.

Respondent suspended payment of Temporary Total Disability benefits on or about February 13, 2013. Following the Temporary Total Disability suspension, Petitioner entered treatment for a non-work related bilateral knee condition, for which he underwent total knee replacement procedures in August 2013 on the left and on January 20, 2016 on the right. He returned to work for another employer, Meade Electric, from April 21 through November 13, 2014 (RX 5), interrupted by a non-work related fracture to his left fourth metacarpal due to a fall at home on May 4, 2014. He treated with Dr. Muhammed and Ryan Center for Hand Therapy for the non-work related metacarpal fracture. He missed work from May 4 through June 24, 2014, at which time Dr. Muhammed released him to return to full-duty work in relation to the non-work related metacarpal fracture.

Petitioner returned to Dr. Fernandez on December 16, 2014. He complained of pain and numbness in both hands, now worse on the left, particularly in the ulnar nerve distribution with pain

emanating from the median elbow distally, and with pain, triggering and locking in the left small finger with associated weakness. On sensory examination, parasthesias were noted in both hands with slight predilection towards the ulnar nerve distribution. On provocative testing, Dr. Fernandez found definite irritability of the ulnar nerve at the elbow and of the median nerve at the wrist, with positive Tinel's test, positive compression test, positive elbow flexion test and positive Phalen's test, all of which seemed to worsen the patient's symptoms and complaints. Subjective motor weakness was present. Swelling was noted along the medial elbow and the carpal canal. Specific discomfort was observed on palpation along the posteromedial elbow and along the carpal canal. Palpable tenderness was present in the left small finger with nodular thickening at the A1 pulley, with significant pain. Dr. Fernandez's conclusion was "bilateral upper extremity complaints post-digging trenches at work" on June 30, 2011. He again diagnosed bilateral elbow cubital tunnel syndrome; bilateral wrist carpal tunnel syndrome, status-post previous carpal tunnel releases; and left small finger A1 stenosing tenosynovitis. Dr. Fernandez prescribed a repeat EMG of the upper extremities. He continued to recommend bilateral cubital tunnel releases and revision carpal tunnel releases, now to include treatment of the left small finger, including consideration of injection or surgery. Dr. Fernandez stated that his opinion regarding causality had remained unchanged.

Petitioner underwent a repeat EMG on February 10, 2015. The neurologist, Dr. Hong, found mild delayed bilateral median motor nerve distal latencies and mild delayed bilateral median sensory nerve conduction velocity from the mid-palm to the wrist, and mild denervation potential to the right median nerve innervated muscle distal to the wrist, compatible with mild bilateral median neuropathies at the wrist; i.e., carpal tunnel syndrome, compromising the sensory and motor nerves. On March 12, 2015, after reviewing the EMG, Dr. Fernandez prescribed surgery beginning with a left elbow cubital tunnel release with subcutaneous transposition, as well as a left wrist mid-open revision carpal tunnel release and left small finger A1 pulley release. He placed Petitioner on work restrictions of no work involving the left upper extremity.

Petitioner next saw Dr. Fernandez on June 3, 2015. The diagnosis remained bilateral elbow cubital tunnel syndrome, active; bilateral wrist carpal tunnel syndrome, status-post previous bilateral carpal tunnel releases; and left small finger A1 stenosing tenosynovitis. At Petitioner's request, Dr. Fernandez released him back to work on a trial basis.

Petitioner worked off and on as a journeyman union electrician for various contractors throughout 2015. From January 21 through February 4, 2015, he was employed by Nucor Electric. From June 17 through 30, 2015, he was employed by Durkin Electric. From July 22 through 31, 2015, he was employed by Great Lakes Electric, and from August 11 through November 4, 2015, he was employed by Rapp Electric. He did not work between March 12 and June 3, 2015, during which Dr. Fernandez had imposed a restriction of no work involving the left upper extremity.

Dr. Thomas Wiedrich examined Petitioner on January 13, 2016 and penned a narrative medical report to Respondent's claims adjuster. Of note, signs of ulnar nerve irritation at the elbow were observed on physical examination. Dr. Wiedrich opined that the patient may have bilateral cubital tunnel syndrome, despite the absence of EMG findings. Dr. Wiedrich explained that EMG/NCV studies fail to reveal diagnostic evidence of cubital tunnel syndrome in up to thirty percent of patients. According to Dr. Wiedrich, cubital tunnel surgery "may be very reasonable in this gentleman to help and to alleviate the numbness and tingling over the ring and small fingers." At the same time, no positive findings were present on provocative tests for cervical radiculopathy as a

potential etiology of the patient's upper extremity numbness. Neither were there any positive findings on provocative tests for carpal tunnel syndrome. Noting that the patient's NCV studies in both wrists had improved post-surgically, Dr. Wiedrich asked to review the February 10, 2015 EMG before determining whether to recommend carpal tunnel releases. Dr. Wiedrich added that in his opinion, Petitioner should not lift more than ten pounds on a continuous basis and should not perform forceful, repetitive activities for more than two-thirds of a workday.

After reviewing the February 10, 2015 EMG, Dr. Wiedrich again recommended surgery on the cubital tunnels. He explained that Petitioner's bilateral upper extremity numbness was primarily in the ulnar nerve distribution, and thirty percent (30%) of patients with cubital tunnel syndrome do not exhibit positive findings on EMG/NCV. As to the patient's carpal tunnel syndrome, Dr. Wiedrich noted that mild median nerve dysfunction was still present on the EMG/NCV, but that objective improvement had been seen since the surgery. The fact that the nerve testing showed postoperative improvement led Dr. Wiedrich to conclude that adequate release of the carpal tunnels had been achieved during the first surgery. Accordingly, Dr. Wiedrich did not recommend a revision carpal tunnel release, notwithstanding the fact that median nerve dysfunction was still present on the February 10, 2015 EMG/NCV.

On January 20, 2016, Petitioner underwent a non-work related right total knee replacement. He was off work until May 2016 while recuperating from his right knee surgery.

Dr. Fernandez saw the patient most recently on July 31, 2018. Petitioner reported that his symptoms had reached 5/10 to 6/10 in severity. He still had complaints of numbness, tingling and pain in both upper extremities with associated weakness, although he had been working various electrical jobs out of the union hall on and off during 2016, 2017 and 2018. Surgery had still not yet been authorized. Dr. Fernandez's diagnoses were bilateral wrist carpal tunnel syndrome, status-post previous carpal tunnel releases, recurrent; and bilateral elbow cubital tunnel syndrome. Dr. Fernandez recommended self-restriction when possible, with use of elbow pads and wrist splints until such time as surgery has been authorized.

Dr. Fernandez testified by evidence deposition on October 5, 2018. Dr. Fernandez stated that in his opinion, Petitioner's bilateral carpal and cubital tunnel syndromes are causally related to the work that he was doing in June 2011, based on the fact that he had no significant symptoms or treatment for those symptoms before that time. He had exposure to conditions that the doctor would consider as causative or aggravating to carpal and cubital tunnel syndrome; he presented in a reasonable fashion after the onset with that history; and he thereafter entered treatment for those conditions. Accordingly, Dr. Fernandez concluded that the events of June 30, 2011 constituted a contributing cause of the patient's bilateral carpal and cubital tunnel syndromes.

According to Dr. Fernandez, Petitioner's symptoms were consistent and credible. Dr. Fernandez never felt that Petitioner was magnifying or exaggerating any of his complaints or symptoms; to the contrary, Petitioner continued to attempt working at full duty in spite of his condition. Dr. Fernandez felt that Petitioner was a "reasonable person who was trying to get better with a proper diagnosis".

Dr. Fernandez testified that his recommendation for staged, bilateral carpal and cubital tunnel release surgeries remains unchanged at the present time. He would begin either with the arm that is

the most severe, or with the non-dominant arm. Following each procedure, the patient would be in a sling or a splint and would be taking pain medication. After that, he would require six to twelve physical therapy visits. An individual whose job involves heavy exertional activity would be unable to return to full-duty work for two to four months postsurgically.

On cross-examination, Dr. Fernandez was asked to support his conclusion that the February 14, 2012 EMG, performed by Dr. Santiago-Palma, was positive bilaterally for carpal and cubital tunnel syndromes. Dr. Fernandez explained that the EMG finding of prolonged latencies and decreased amplitude on sensory conduction studies of the right and left median nerve constituted an abnormal finding, consistent with bilateral carpal tunnel syndrome. Similarly, the finding of prolonged latencies and decreased amplitude on sensory conduction studies of the right and left ulnar nerve also constituted an abnormal finding, consistent with bilateral cubital tunnel syndrome. Finally, the prolonged latencies found on motor conduction studies of the right and left median nerve were abnormal and consistent with bilateral carpal tunnel syndrome. In sum, the EMG findings relating to the median and ulnar nerves were abnormal, while all studies relating to the radial nerve were normal. Dr. Fernandez could not explain why neither Dr. Muhammed nor Dr. Santiago-Palma ever diagnosed cubital tunnel syndrome, given the abnormal EMG findings suggestive of both carpal and cubital tunnel syndrome.

On redirect examination, Dr. Fernandez explained that a diagnostician must rely on what he termed a "three-legged stool," consisting of: (1) the patient's history and clinical symptoms, (2) the findings on physical examination, and (3) the diagnostic studies; e.g., the EMG in this case. Those three elements, taken together, formed the basis of Dr. Fernandez's diagnosis of bilateral carpal and cubital tunnel syndromes in this case.

Dr. Cohen testified by evidence deposition on August 22, 2018. In Dr. Cohen's opinion, Petitioner did not have carpal tunnel syndrome, because his symptoms were not "classic" for numbness in the correct pattern of the median nerve. Dr. Cohen further testified that in his opinion, Petitioner does not have cubital tunnel syndrome, due to the absence of significant motor latency changes as the signal passes across the elbow on the EMG. However, Dr. Cohen acknowledged that the EMG is "not the pathognomonic test" for cubital tunnel syndrome; rather, one must look to the patient's symptoms and findings on physical examination. In Dr. Cohen's opinion, Petitioner has no upper extremity injuries that were caused or aggravated by the work accident that he described at the September 19, 2012 examination. Rather, he stated that the patient sustained at most a mere sprain/strain to his upper extremities, which should have resolved long ago.

Dr. Wiedrich testified by evidence deposition on April 2, 2019. At the time of his examination, Dr. Wiedrich's diagnosis was cubital tunnel syndrome, based on the patient's history and physical examination, and notwithstanding the suggestion that the EMG was negative for cubital tunnel. Dr. Wiedrich explained that roughly thirty percent of patients with cubital tunnel syndrome have normal EMG findings. Dr. Wiedrich agreed with Dr. Fernandez's recommendation for cubital tunnel release or transposition surgery. He stated that an ulnar nerve release would first be performed at the elbow. If the nerve stays put, then one would not proceed to transposing the nerve. But if the nerve tends to move out of the little groove in which it sits, then the surgeon should do a full transposition of the nerve. Dr. Wiedrich further testified, based upon the improvement shown on the EMG postsurgically and the fact that the patient's symptoms were more referable to the ulnar than to the median nerve distribution, that the patient's carpal tunnel syndrome had been adequately treated. Dr. Wiedrich did

not feel that a revision carpal tunnel release would benefit this patient. Dr. Wiedrich agreed that his report expressed no opinion regarding causal connection, and that he was not asked to comment on the issue of causal connection. Dr. Wiedrich further agreed that based upon the patient's history and the treating medical records, the patient has bilateral cubital tunnel syndrome, and that a bilateral cubital tunnel release would be reasonable to relieve the numbness and tingling that Petitioner experiences over his ring and small fingers.

Petitioner testified that his upper extremity symptoms have hardly changed since he was first injured. He continues to experience pain and tingling in both hands involving the middle, ring and small fingers and the adjacent palm; it feels as if he slapped his hands on the concrete. While working, he has difficulty performing fine proprioceptive tasks such as spinning wire nuts and removing bolts. He drops things due to numbness in his hands and fingers. He needs to be especially careful when working with live wires. He forces himself to continue working, although he finds it dangerous and uncomfortable. Aside from the left fourth metacarpal fracture that he sustained at home in May 2014, Petitioner has had no new accidents or injuries involving his hands or arms. If the surgery prescribed by Dr. Fernandez were to be authorized, he would still wish to have the surgery.

The following medical bills were admitted in evidence:

Provider	Service Date(s)	Balance
Oak Orthopedics	10-11-2011 to 01-13-2012	$595.00
Prescription Partners, LLC	01-13-12	$274.57
Total:		$869.57

(PX Group 9). Respondent introduced its payment ledger showing medical bill payments (RX 3). The ledger does not indicate that any payments were made towards the bills of Oak Orthopedics and Prescription Partners for the dates of service and outstanding charges set forth in PX Group 9.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

On the Request for Hearing, Respondent agreed that Petitioner sustained accidental injuries arising out of and in the course of his employment in relation to his bilateral wrist condition, but disputed that Petitioner sustained a work accident in relation to his elbow/arm condition. Petitioner testified that while backfilling trenches on and before June 30, 2011, he noticed numbness and tingling in both hands and in the third through fifth fingers, radiating up into the wrists and forearms. No other eyewitnesses testified to the events that occurred at work on and before June 30, 2011.

Petitioner's upper extremity complaints were consistent throughout his course of treatment with Drs. Ellis, Corcoran, Muhammed, Santiago-Palma and Fernandez. The medical testimony indicates that the numbness in Petitioner's fourth and fifth fingers implicates the ulnar nerve and is consistent with bilateral cubital tunnel syndrome at the elbow, while the numbness in his hands could be consistent with bilateral carpal tunnel syndrome at the wrist. Drs. Ellis, Corcoran, Muhammed, Santiago-Palma and Fernandez were all of the opinion that Petitioner sustained bilateral carpal tunnel syndrome as a consequence of his work activities. While only Drs. Fernandez and Wiedrich diagnosed cubital tunnel syndrome, positive diagnostic findings were present on the February 2012 EMG that were consistent with cubital tunnel syndrome. As to those EMG's that were negative for cubital tunnel, Drs. Cohen, Fernandez and Wiedrich all agreed that 25% to 30% of cubital tunnel patients have negative EMG findings. For his part, Dr. Cohen found that Petitioner has neither carpal nor cubital tunnel syndrome; however, Dr. Cohen's opinion stands alone. In contrast, Drs. Ellis, Corcoran, Muhammed, Santiago-Palma and Fernandez all observed Petitioner throughout his course of treatment and were in the best position to comment upon issues of causality.

The Arbitrator additionally notes that of all the treating physicians in this case, only Dr. Fernandez has had the benefit of reviewing the entire body of treating medical records, including both operative summaries and all three EMG's. In contrast, Dr. Cohen saw the patient on but one occasion at Respondent's request; yet even Dr. Cohen acknowledged on cross-examination that Petitioner may well have had bilateral carpal tunnel syndrome prior to his surgeries. Dr. Wiedrich also saw the patient only once, and he was asked to comment only on the issues of surgical necessity and disability.

The Arbitrator finds that Petitioner's testimony in relation to his work injury was credible and unrebutted. As to the medical testimony and opinions, the Arbitrator assigns the greatest evidentiary weight to the opinions of Dr. Fernandez, and significant evidentiary weight to the opinions of Drs. Ellis, Corcoran, Muhammed and Santiago-Palma.

Based upon the foregoing, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of his employment for Respondent on June 30, 2011; that his resulting injuries included bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome; and that the condition of ill-being of Petitioner's upper extremities is in all respects causally related to the injuries sustained on June 30, 2011.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Based upon the two medical bills in evidence (PX Group 9) and Respondent's medical payment ledger (RX 3), it appears that Respondent has paid all related medical expenses to date except for the bills of Oak Orthopedics for dates of service October 11, 2011 through January 13, 2012 in the amount of $595.00, and the Prescription Partners bill dated January 13, 2012 in the amount of $274.57, for a total of $869.57 in actual charges.

The Arbitrator therefore finds that Petitioner is entitled to receive the further sum of $869.57 for reasonable and necessary medical services, subject to 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, as provided in §8(a) and §8.2 of the Act.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

Three physicians have testified on the issue of prospective medical care: Dr. Fernandez has prescribed staged, bilateral carpal and cubital tunnel releases. Dr. Wiedrich has recommended bilateral cubital tunnel releases but would forego the revision carpal tunnel releases. Dr. Cohen found that Petitioner doesn't have carpal or cubital tunnel syndrome and requires no treatment at all for his bilateral upper extremity symptoms. For the reasons previously stated, and considering the medical evidence as a whole, the Arbitrator finds the testimony and opinions of Dr. Fernandez to be the most persuasive. Accordingly, Respondent is ordered to authorize and pay for the surgical procedures prescribed by Dr. Fernandez, including all necessary pre- and postcare.

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

Petitioner ceased working on August 4, 2011, the day he saw Dr. Ellis. From August 8 through October 11, 2011, he was off work based upon Dr. Corcoran's instructions. From October 11 2011 through June 17, 2012, he was off work based on Dr. Muhammed's instructions. From June 17, 2012 through February 13, 2013, he was off work based on Dr. Fernandez's instructions, after which he temporarily ceased treating for his upper extremities and began treating for his non-work related, bilateral knee condition. From March 12, 2015 through June 3, 2015, he was again unable to work based upon the restrictions imposed by Dr. Fernandez during that period, following which the patient requested and received a trial work release from Dr. Fernandez.

Based upon the foregoing, the Arbitrator finds that Petitioner was temporarily totally disabled from August 4, 2011 through February 13, 2013, and from March 12, 2015 through June 3, 2015, representing 91-6/7 weeks, and that these periods of TTD were in all respects causally related to his work injuries.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Beth Podlasek,

Petitioner,

vs. No. 18 WC 026682

Dahl Landscape Co., Inc.,

21IWCC0039

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 19, 2019 is hereby affirmed and adopted.

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

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

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

DATED: JAN 26 2021
o-1/21/21
MP/dak
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

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

PODLASEK, MARY BETH
Employee/Petitioner

Case# **18WC026682**

DAHL LANDSCAPE COMPANY INC
Employer/Respondent

21IWCC0039

On 10/29/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% 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:

2208 CAPRON & AVGERINOS PC
55 W MONROE ST
SUITE 900
CHICAGO, IL 60603

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

21IWCC0039

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Mary Beth Podlasek
Employee/Petitioner

v.

Dahl Landscaping Company, Inc.
Employer/Respondent

Case # **18 WC 26682**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Seal**, Arbitrator of the Commission, in the city of **Ottawa**, on **8/29/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [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, **7/21/18**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$8,167.34**; the average weekly wage was **$209.95**.

On the date of accident, Petitioner was **56** 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 **$8,445.55** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$8,445.55**.

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

ORDER

The Arbitrator finds that the petitioner sustained accidental injuries to her lumbar spine on July 21st, 2018, from which she reached maximum medical improvement by April 26, 2019.

Respondent shall pay Petitioner temporary total disability benefits at the rate of $209.95/week for 40 weeks, the period of 7/21/18 through 4/26/19. Respondent shall receive credit for benefits paid in the amount of $8,445.55.

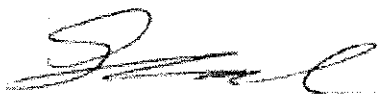
The Arbitrator finds that the respondent has paid all reasonable, necessary, and appropriate medical, as the petitioner reached maximum medical improvement by 4/26/19.

Petitioner's request for prospective medical treatment is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for 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

October 28, 2019
Date

ICArbDec19(b)

OCT 29 2019

STATEMENT OF FACTS 21IWCC0039

The petitioner in this case is a 57-year old female employed as a sales clerk with the respondent in its retail location. Petitioner testified that as part of her job duties she was required to unload trucks, set up plants, maintain the plants, including watering on a daily basis, and take care of customers in the gift shop. On July 21, 2018, she was putting bushes, flowers, and plants into the back of a customer's SUV. (T.12). When she lifted a small bush into the vehicle, she testified that she experienced low back pain that radiated into the right leg and foot and took her down to the ground.

According to the petitioner's medical records, she was transported to the emergency department at Silver Cross Hospital on July 21, 2018. X-rays and a non-vascular ultrasound of the right lower extremity were performed. Petitioner was given prescriptions for Tylenol #3, Meloxicam, Baclofen, and a pain patch. (PX3).

On July 26, 2018, the petitioner came under the care of Dr. Jason Hurbanek at Hinsdale Orthopaedics. She reported that she was lifting items into a customer's car, and given how heavy it was, she had lifted her right leg (hip flexion) and felt a pull at the proximal right hamstring. She now complained of numbness and shooting pain down the posterior thigh with tingling in her right toes. She was also ambulating with the assistance of a cane. It was noted that petitioner's surgical history included several right knee reconstructions, but she reported she was doing well prior to the accident. Physical examination revealed a small palpable gap at the proximal hamstrings with tenderness at the proximal hamstrings and hamstring origin. Dr. Hurbanek diagnosed petitioner with a right hamstring strain. He recommended petitioner obtain an MRI of the right leg to rule out a hamstring tear and remain off work. (PX3).

MRI of the right thigh was performed at Hinsdale Orthopaedics on August 2, 2018, revealing a possible atypical cystic lesion at the anterior medial aspect of the semimembranous muscle, which could be a ganglion cyst, neuroma, or neurogenic tumor. Due to the atypical location of the lesion, an enhanced MRI was suggested. Degenerative changes, including high-grade chondromalacia, were noted in the right knee. There was no evidence of tendon tear or muscle strain. (PX3).

Petitioner returned to Hinsdale Orthopedics on August 6, 2018, at which time she stated that her symptoms were getting worse. Petitioner continued to report that all of her pain was in the posterior aspect of her thigh with extreme tenderness. She was prescribed a Medrol DosePak and over the counter anti-inflammatories. Petitioner was also referred for an MR Arthrogram to further evaluate the cystic lesion. (PX3).

On August 14, 2018, the petitioner was reexamined by Dr. Hurbanek. He advised that he was unable to explain petitioner's persistent hamstring pain based on the right leg MRI results. His recommendation was for petitioner to begin physical therapy and obtain an MRI of the lumbar spine to rule out referred pain from a potential disc herniation. (PX3).

On August 23, 2018, the petitioner underwent an MRI of the lumbar spine, which showed a posterior right paracentral disc protrusion/extrusion at L5-S1, causing posterior and lateral displacement of the right lateral recess and likely S1 radiculopathy. There was also a disc bulge at L2-L3, causing moderate/severe central canal stenosis, moderate right, and mild left neural foraminal stenosis. A minimal disc bulge was also seen at L3-L4, most prominent in the left foraminal region, with probable left foraminal zone annular tear, resulting in mild left neural foraminal narrowing. Lastly, there was a minimal disc bulge at L4-L5 with minor left neural foraminal narrowing. (PX3).

Based on the MRI results, Dr. Hurbanek referred petitioner to Dr. Cary Templin for further evaluation on August 30, 2018. Petitioner was also given a referral to Pain and Spine to see whether any additional treatment could be recommended. (PX3).

Surveillance was performed by Mr. Greg Spelson of the Robison Group on September 13, 2018 and September 14, 2018. On several occasions, petitioner was seen pulling large garbage bins up her driveway. (RX10, RX11).

Petitioner then came under the care of Dr. Templin on September 18, 2018. She complained of severe low back pain that radiated into the right lower extremity. Although denied weakness, there was occasional numbness. Based on his review of the MRI, Dr. Templin noted a large extruded fragment at L5-S1 impinging the right S1 nerve root. He recommended petitioner proceed with a right transforaminal epidural steroid injection; however, petitioner advised that she was apprehensive to have any injections. Therefore, Dr. Templin recommended she continue with physical therapy and remain off work. If she failed to improve, consideration would be given to surgical intervention. (PX3).

Dr. Steven Mather examined petitioner at DuPage Medical Group Orthopedics on September 28, 2018 for the purpose of an independent medical evaluation. Petitioner reported that she was lifting an object, weighing approximately 15 pounds, when she felt a sudden, severe back pain that shot down her right leg into her foot as she was leaning into the vehicle. Petitioner also stated that she dropped to her knees and bent forward to relieve the pain. Based on his evaluation, Dr. Mather diagnosed petitioner with an L5-S1 disc herniation, which was causally-related to the July 21, 2018 work injury. Although she failed to report any low back pain in the initial medical records, Dr. Mather advised that it is not uncommon in the case of acute disc herniations for the patient to present with unexplained leg pain. With respect to medical care, Dr. Mather believed the treatment provided to date had been reasonable and necessary. However, given that she failed to improve with conservative treatment, he now recommended that she proceed with a right L5-S1 microdiscectomy. Following surgery, Dr. Mather anticipated that the petitioner could return to light duty work within six weeks and heavy-duty work three months post-operatively. (RX2).

On November 5, 2018, Dr. Templin performed surgery at the Center for Minimally Invasive Surgery, which consisted of a right L5-S1 laminotomy and diskectomy. The post-operative diagnosis remained right L5-S1 herniated disc with radiculopathy. (PX3).

On December 13, 2018, the petitioner returned to Dr. Templin for her five-week post-operative evaluation. She stated that she initially had been doing well, but she noted an increase in bilateral radicular symptoms the prior week. Dr. Templin prescribed Celebrex and recommended that petitioner begin physical therapy, which began at ATI Physical Therapy on December 17, 2018. He continued to recommend petitioner remain off work. (PX3).

After the petitioner failed to improve in physical therapy, Dr. Templin recommended that she obtain a repeat lumbar MRI, which was performed on February 18, 2019. The MRI revealed a prior right L5-S1 laminectomy with mild to moderate central canal narrowing at L2-L3 due to spondylitic spurring. (PX3).

On March 5, 2019, the petitioner returned to Dr. Templin. He noted some mild epidural fibrosis surrounding the right S1 nerve root on the lumbar MRI, but there was no significant stenosis at L2-L3 and no evidence of a herniated disc. Although he recommended an epidural injection, petitioner refused, stating that she could not have cortisone injections. Dr. Templin again recommended physical therapy and referred petitioner to Dr. Marie Kirincic for alternate noninvasive pain management treatment. (PX3).

Petitioner underwent an initial physical therapy evaluation at Athletico on March 11, 2019. She reported her spine was "on fire" all the time and she applied ice to the area five times per day. The therapist noted that petitioner had difficulty getting out of a chair and in tolerance of lying supine, but she was able to perform bilateral straight leg raises, lifting both feet approximately two feet off the table, and neither reported nor showed any outward signs of pain or discomfort. It was noted that petitioner demonstrated possible signs of pain central sensitization and an unhealthy view of tissue recovery, which was supported by her report that she was unable to perform functional mobility for three years after her previous knee surgery. (PX2).

On March 25, 2019, the petitioner came under the care of Dr. Kirincic at Hinsdale Orthopaedics. Petitioner reported her back pain was aggravated with stairs, reaching, lifting, and any kind of bending. Given her refusal to undergo cortisone injections, Dr. Kirincic recommended acupuncture. Petitioner was kept off work. (PX3).

When the petitioner presented to physical therapy the following day, she reported "unbearable pain" and "whole body crunchiness" after the acupuncture treatment, and she was unable to move during therapy. However, the petitioner slowly continued to improve in therapy, and reported no pain at all on March 29, 2019, stating it was "like a miracle." A functional capacity evaluation was scheduled to move forward with a work conditioning program. (PX2).

On April 3, 2019, the petitioner reported to her physical therapist that she wanted to go for a walk later that day. She returned to Athletico on April 5, 2019, and she reported that she had walked for over 40 minutes and felt great during and afterwards. She continued to report "no pain in her back, pelvis, or hips at all." (PX2).

Surveillance efforts were again undertaken by Mr. Spelson of the Robison Group on April 3, April 4, and April 5, 2019. The surveillance video as well as the surveillance report which Robison Group had prepared was entered into evidence as Respondent's Exhibits 10 and 12, respectively. On April 3, 2019, petitioner is initially seen pulling into her driveway. At approximately 2:18 p.m., petitioner is seen departing her residence and walking around her neighborhood at a normal pace. She does not appear to ambulate with an abnormal gait. At one point on her walk, the petitioner drops the lid to her water bottle and bends over to pick it up. After walking for over 40 minutes, petitioner returns to her residence at 3:00 p.m. and disappears from sight.

On April 4, 2019, the petitioner is seen sitting in her car in her driveway at 2:51 p.m. while it snows outside. She then exits her vehicle carrying a grocery bag in her hand and enters her garage. At 2:52, petitioner is seen opening the lid of a large garbage bin, bending inside, and pulling out a trash-filled garbage bag, which she then places by the front door. At 2:53 p.m., she proceeds to pull and push the garbage bin out of the garage corner before pulling it out to the front curb. On April 5, 2019, petitioner was seen driving to an unknown residence, where she remained for the rest of the day.

Four days later, a Functional Capacity Evaluation was performed at Athletico on April 9, 2019. Petitioner reported that she suffered from "constant, severe pain." She also reported significant difficulty picking up light items at home due to her pain. With walking, petitioner was noted to walk slower than normal, and she exhibited diminished trunk rotation with a mild antalgic gait. After two minutes of walking on the treadmill at an agreed pace of 1.5 miles per hour, petitioner abruptly stepped off the treadmill, stated she was in severe pain, and requested to lie down with a cold pack. Based on the petitioner's performance, it was determined that she was only capable of a sedentary physical demand level, with the heaviest weight she was able to lift being 5 pounds. However, the therapist noted that the petitioner's performance was invalid due to her invalid/inconsistent performance. Specifically, petitioner's grip testing was not reproducible during repeated testing. Material handling testing and postures were inconsistent with physical examination and functional testing, and kinesiophysical signs were absent in a preponderance of tasks, which was indicative of the petitioner not displaying maximal effort. Therefore, the therapist concluded that the FCE results did not represent a true and accurate representation of the client's functional capabilities and felt the petitioner would not be a good candidate for a work conditioning program. (PX2).

At petitioner's follow-up visit with Dr. Templin on April 25, 2019, the petitioner was advised she was not a surgical candidate. Given that she did not wish to pursue cortisone injections, petitioner was advised to continue under the care of Dr. Kirincic for further pain management. Otherwise, she was advised she could follow up with Dr. Templin as needed. Although further work restrictions would need to come from Dr. Kirincic, a Work Status Report indicates petitioner was released to modified duty per the FCE, despite PA-C Burgess noting that petitioner's FCE was invalid. (PX3).

Petitioner was reevaluated by Respondent's Section 12 examiner, Dr. Mather, on April 26, 2019. She continued to complain of burning pain in her lower back that shot down her right thigh laterally and posteriorly to the right knee, but she denied any left leg pain following

surgery. Dr. Mather opined that petitioner was exhibiting psychogenic pain with a functional overlay. He believed Dr. Templin did an excellent surgical job as the postoperative MRI revealed no recurrent disk herniation and no residual nerve root compression. Dr. Mather advised that her complaints of persistent, severe low back pain were simply not credible. He specifically noted that petitioner's reported functional limitations were inconsistent with the abilities she demonstrated on the surveillance footage obtained on April 3, 2019 and April 4, 2019, including walking without difficulty, lifting between 5 to 10 pounds, and bending 90 degrees at the waist. Dr. Mather advised that petitioner had reached maximum medical improvement and required no further treatment. He also felt she was capable of returning to full duty work without restrictions. (RX2).

Petitioner then sought a second opinion from Dr. Amir El Shami from Illinois Spine & Scoliosis Center on May 7, 2019. She had previously started treating with Dr. El Shami on January 21, 2019 for left knee complaints, but petitioner testified that her bilateral knee pain was unrelated to the work accident. Petitioner reported ongoing low back pain that radiated into the right buttocks and right lower extremity. She stated that she had treated with acupuncture, NSAIDS, homeopathic remedies, and physical therapy following surgery, but denied any relief. Dr. El Shami recorded petitioner's reported functional limitations, including walking, stooping, bending, and lifting. He also noted that petitioner was unable to complete an FCE due to pain, and voiced concern that she was still released to return to work without restrictions. Based on his examination, which demonstrated weakness, Dr. El Shami diagnosed petitioner with lumbago with sciatica, chronic pain, lumbar radiculopathy, and sacroiliitis. He recommended petitioner obtain an updated CT of the lumbar spine due to his concern for ongoing radiculopathy. Petitioner was advised to remain off work. (PX1).

A CT of the lumbar spine was obtained on May 14, 2019 at Homer Glen Imaging, revealing multilevel degenerative disc disease and osteoarthritis. There was also mild misalignment at L2-L3 and L3-L4 with a disc bulge and decrease in disc height at L2-L3. Disc bulges were also noted at L3-L4, L4-L5, and L5-Sl. Later that same day, an EMG/Nerve Conduction Study was performed by Dr. El Shami at Illinois Spine & Scoliosis Center, which demonstrated a right S1 radiculopathy with high-grade associated active denervation and evidence of muscle loss. (PX1).

On May 15, 2019, Dr. El Shami referred petitioner to Dr. Jared Hansen of Allied Anesthesia Associates for a transforaminal epidural steroid injection, which was performed at the L4-5 and L5-Sl levels on June 11, 2019. After minimal relief, petitioner then proceeded with a caudal epidural steroid injection and facet joint intraarticular steroid injection at L5-S1 to address her primary diagnosis of nerve impingement on July 18, 2019. (PX1).

Petitioner returned to Dr. El Shami on July 30, 2019. She reported worsened pain in the bilateral lower back with sharp pain in her thighs. Petitioner stated that she could not walk longer than 15 minutes without severe pain and had trouble sitting. Physical examination revealed pain and limited range of motion in all directions, especially with extension and side bending. Flexion of the spine was limited to 45 degrees. Dr. El Shami referred petitioner for surgical consultation for a possible lumbar fusion. (PX1).

At the respondent's request, Dr. Mather authored a supplemental addendum report on July 31, 2019. After reviewing medical records from Dr. El Shami, including the May 14,

2019 lumbar CT and EMG/Nerve Conduction Studies, Dr. Mather advised that his opinions were unchanged. He believed petitioner had reached maximum medical improvement with respect to her work-related lumbar condition on April 26, 2019. Based on the CT of the lumbar spine, Dr. Mather advised that there were no signs of recurrent disk herniation and no signs of instability. He also disagreed with Dr. El Shami, noting that the May 14, 2019 EMG showed nerve reinnervation, which is often seen for 12 to 24 months after any nerve injury. Dr. Mather stated that it was encouraging to see progressive recovery of the nerve, and that this should not have any impact on the petitioner's need for surgery. Furthermore, Dr. Mather explained that mild loss of disk height at the operative level would not support the need for surgery. Dr. Mather stated that a finding of multilevel lumbar degenerative disc disease would be a contradiction to a fusion procedure. He again stated that the petitioner was capable of returning to work full duty without restrictions. (RX3).

Respondent produced additional surveillance that was performed by Mr. Spelson of Robison Group on August 9, 2019, August 13, 2019, and August 14, 2019. The surveillance video as well as the surveillance report which Robison Group had prepared was entered into evidence as Respondent's Exhibits 10 and 13, respectively. At 9:46 a.m. on August 9, 2019, petitioner was seen walking back to her house from a nearby neighbor. As she crossed the street, petitioner bent down at the waist to pick up some debris on the ground and placed it in one of the garbage bins at the curb. She then pushed one large garbage bin up her driveway while pulling a second garbage bin behind her. The Arbitrator notes petitioner did not appear to have any difficulty bending.

At 11:05 p.m., the petitioner was seen entering Menards, where she pushed a shopping cart through the store. The cart contained a long box, and the petitioner was seen bending at the waist several times to look at items on lower shelves. At 11:20 p.m., the petitioner had loaded the box into her trunk. She was then seen arriving at Our Lady of Angel Retirement Home. At 12:50 p.m., the petitioner was observed pushing a woman in a wheelchair around the facility before stopping to sit at a bench. Petitioner identified this woman as her mother. (T. 65). At 12:58 p.m., the petitioner stood up to adjust the positioning of her mother's wheelchair, which required her to bend over the wheelchair to release the wheel lock. At 1:02 p.m., petitioner pushed her mother's wheelchair around the premises and relocated to sitting in a more shaded area. The Arbitrator notes that petitioner walked with a normal gait.

At 2:20 p.m., the petitioner was seen back at her home residence, where she unloaded a long box from her trunk and carried it into the garage. She then walked across the street and pulled a garbage bin back to her residence. At 2:39 p.m., petitioner was observed trimming tree branches overhead in her backyard with a long pole saw. She switched between using both hands and using only one hand to saw the branch. Petitioner also utilized her full body weight to saw the branch overhead by bending at the knees. After sawing the branch for 3 minutes, it fell, and she was seen carrying to it to the edge of the yard. Petitioner was next seen on August 14, 2019, at which time she was observed sitting in her yard performing yard work.

Petitioner's initial evaluation with Dr. Anthony Rinella of Illinois Spine & Scoliosis Center was on August 16, 2019. She rated her pain between 6 and 10 on a 10-point visual analog scale. Dr. Rinella noted upon physical examination that petitioner was ambulating

with an antalgic gait. She was also only able to forward flex to 30 degrees. Dr. Rinella advised that he was most concerned regarding the foraminal narrowing on the right at L5-S1. He recommended a transforaminal lumbar interbody fusion at that level. Prior to surgery, the petitioner was advised to remain off work. (PX1).

At the arbitration hearing, the petitioner testified that she intends to proceed with the lumbar fusion proposed by Dr. Rinella. She continued to complain of worsening lower back pain, which she described as a "hot poker, constant." Petitioner denied experiencing any periods where she has a lack of pain or complete resolution of her pain. In an attempt to alleviate the pain, petitioner testified that she lies on the couch at least four times per day with an ice pack, but she is still always in pain. She estimated that her pain wakes her up a dozen or more times during the course of a night.

When asked on direct examination how her pain affects her ability to engage in activities of daily living, petitioner stated that she tries to do only do so much in one day. (T.27). She testified that she was able to stand but not for long because of the shooting pains and aggravation to her low back. Petitioner also testified that bending forward and trying to stand up caused "excruciating pain." (T.25). She has not returned to work in any capacity since the July 21, 2018, accident due to her low back pain. (T.28).

CONCLUSIONS OF LAW

In support of the Arbitrator's decision with respect to (C), did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The Arbitrator finds that the petitioner sustained accidental injuries which arose out of and in the course of her employment with the respondent on July 21, 2018.

This finding is based on the unrebutted testimony of Petitioner and the medical records submitted into evidence which document that the petitioner reported a consistent mechanism of injury. Petitioner was lifting a small bush into a customer's vehicle when she developed severe pain in her right hamstring. The medical records provide petitioner sought immediate medical treatment in the emergency department at Silver Cross Hospital.

In support of the Arbitrator's decision with respect to (F), is petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that the petitioner suffered an injury to her lumbar spine as a result of the work accident on July 21, 2018. However, the Arbitrator finds that the petitioner failed to meet her burden of proof in regard to whether her current condition of ill-being is causally related to the work injury. The Arbitrator relies on the opinions of Respondent's Section 12 examiner, Dr. Mather, in finding that the petitioner reached maximum medical improvement on or by April 26, 2019.

First and foremost, in testifying about her current condition of ill-being, the Arbitrator notes that the petitioner was a less than credible witness. In resolving questions of fact, it is the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign the weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Kirkwood v. Indus. Comm'n,* 84 Ill.2d 14, 20 (1981). In this case, the Arbitrator notes that the petitioner testified that she never has been out of pain since her July 21, 2018, accident. She stated that she continues to experience constant pain every day and lies down up to four times per day with an ice pack. (RX2). Petitioner also stated that she experienced excruciating pain when bending down. She testified that she could not walk more than 20 minutes and sitting could be difficult depending on the surface.

However, following the November 5, 2018 surgery, the petitioner reported to her therapist at Athletico on numerous occasions that her low back pain had significantly improved, and sometimes even completely resolved. Petitioner also continued to report improvement with function, even walking up to 40 minutes per day – until she was scheduled for FCE to assess her ability to return to work.

The Arbitrator notes that the petitioner's performance at her April 11, 2019, FCE was found to be inconsistent and invalid, and finds this evidence to be persuasive. Although the petitioner reported constant, burning pain, this is directly contradicted by the prior therapy notes where she documented significant improvement following surgery. Additionally, on April 3,

2019, the medical records show that the petitioner reported to her therapist that she had been able to walk 40 minutes without significant pain during or afterwards. However, during the FCE the following week, the petitioner stopped walking after two minutes, reported excruciating back pain, and requested to lie down with an ice pack. She also reported significant pain when she attempted to lift more than 5 pounds.

When the petitioner was asked on cross-examination about the therapist's note on April 5, 2019, which mentioned that she was capable of walking more than 40 minutes, the petitioner denied having said that to her therapist, saying it would surprise her if that was documented in the medical records. However, this is clearly contradicted by the April 3, 2019, surveillance introduced into evidence by the Respondent, which shows petitioner walking around her neighborhood without any noticeable difficulty for over 40 minutes. She is even seen bending over to pick up the lid of her water bottle that she dropped, and the petitioner showed no signs of being in excruciating pain.

Petitioner's actions as documented on the April 2019 and August 2019 surveillance are inconsistent with her testimony, and the history she provided to Dr. Templin, Dr. El Shami, Dr. Hansen, Dr. Rinella, and Dr. Mather. It is evident from the surveillance footage produced by Respondent that the petitioner is capable of standing, bending, walking, pulling, pushing, and reaching at a far greater capacity than she reported to her treating physicians.

When the petitioner was seen by Dr. Rinella on August 16, 2019, she reported that she continued to be in constant pain. Dr. Rinella noted that the petitioner was ambulating with an antalgic gait and could only forward flex to 30 degrees. However, the Arbitrator notes that the surveillance from August 9, 2019, undertaken one week prior to Dr. Rinella's initial evaluation, shows petitioner was capable of full flexion. In fact, the petitioner was seen bending down to the ground and picking up a piece of litter without any difficulty. Additionally, the petitioner was observed via surveillance walking around her neighborhood, walking around a Menards store and around her mother's retirement home on August 9, 2019, and she exhibit a normal gait pattern.

Unlike Dr. El Shami and Dr. Rinella, Dr. Mather did have an opportunity to review all of the medical records, diagnostic studies, and surveillance footage in this case, providing him with an accurate and complete picture of petitioner's current condition of ill-being. He opined that the petitioner's reported limitations were completely inconsistent with the surveillance, and the Arbitrator agrees. Accordingly, the Arbitrator finds Dr. Mather to be the most credible witness in this case, as he had all necessary information prior to rendering his causation opinions.

As to the recommended surgery, Dr. Templin, the petitioner's surgeon, and Dr. Mather both reviewed the February 18, 2019, repeat lumbar MRI and found no recurrent disc herniation. Both Dr. Templin and Dr. Mather also agree that the petitioner is no longer a surgical candidate. Additionally, the Arbitrator cannot rely on the medical records from Dr. Rinella, who opined that the petitioner was a candidate for L5-S1 fusion, as he based his opinion on inaccurate information.

The Arbitrator specifically notes that the respondent's surveillance in this instant case would not in and of itself be determinative. The surveillance does show the petitioner quite active and exceeding her claimed limitations.

But what the Arbitrator finds troubling is that the petitioner's testimony was so extreme. She testified to extreme and unrelenting pain – which also is what she told her medical providers. Her testimony at arbitration and histories to providers is completely contrary to her activities and behaviors in the respondent's surveillance.

Based on the entirety of the evidence, the Arbitrator finds that the petitioner reached maximum medical improvement relative to the lumbar spine by April 26, 2019, and that any treatment after April 26, 2019, is not causally related to the described work accident.

In support of the Arbitrator's decision with respect to (J), were the medical services that were provided to Petitioner reasonable and necessary, and has the Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Incorporating the aforementioned finding that the petitioner reached maximum medical improvement on or by April 26, 2019, in relation to her work injuries, the Arbitrator finds that any and all medical treatment incurred after April 26, 2019 was unrelated to the July 21, 2018, work accident. Accordingly, Respondent is not responsible for any medical bills incurred after April 26, 2019.

Additionally, the petitioner testified that the medical bills from Hinsdale Orthopedics, Homer Glen Open MRI, Silver Cross Hospital, Illinois Spine & Scoliosis Center, and Athletico submitted as Petitioner's Exhibit 4 only represent treatment petitioner received following Respondent's termination of benefits on or about April 26, 2019. Therefore, the Arbitrator finds that the Respondent has paid for all reasonable and necessary medical services for this claim. (T.29-30).

The Arbitrator notes that while the petitioner submitted a receipt for payments that she made out of pocket, she testified on direct examination that she was reimbursed by Respondent for those expenses prior to hearing. (T.29).

As Respondent noted at the time of the Arbitrator hearing, the medical bills from the Illinois Spine & Scoliosis Center for dates of service January 21, 2019, and March 12, 2019, are for treatment of the left knee, which petitioner testified was unrelated to the July 21, 2018, accident. Therefore, the Respondent is not responsible for these medical bills.

The Arbitrator also finds that the Lidoderm patches prescribed at the emergency department were not medically reasonable and necessary, as evidence by the August 13, 2018, utilization review report put into evidence as Respondent's Exhibit 4. Specifically, the Lidoderm patches were non-certified by the reviewing physician as the ODG guidelines state that the topical analgesics are largely experimental in use with few randomized controlled trials to determine efficacy or safety. There was no evidence presented by petitioner to rebut the UR

determination. Petitioner also testified that she was no longer using the patches as they no longer provided her with relief.

In support of the Arbitrator's decision with respect to (K), is the petitioner entitled to any prospective medical care, the Arbitrator finds as follows:

Incorporating the aforementioned finding that the petitioner reached maximum medical improvement on or by April 26, 2019, in relation to her work injuries, the Arbitrator finds that Petitioner is not entitled to any prospective medical care for this claim. Specifically, the petitioner's request for authorization of the recommended transforaminal lumbar fusion at L5-S1 is hereby denied.

In support of the Arbitrator's decision with respect to (L), what temporary benefits are in dispute, the Arbitrator finds as follows:

Petitioner seeks TTD benefits from July 22, 2018, to August 29, 2019, a period of 55-3/7 weeks. Incorporating the aforementioned finding that Petitioner reached maximum medical improvement on or by April 26, 2019, in relation to her work injuries, the Arbitrator finds the petitioner entitled to TTD benefits from July 22, 2018, through April 26, 2019, or 40 weeks.

The petitioner bears the burden of proving not only that she did not work, but that she could not work. The surveillance shows that the petitioner was capable of returning to work in some capacity. However, she was kept off work based solely on the false representations that she made to her physicians regarding her physical limitations.

In light of Dr. Mather's opinion that the petitioner was capable of returning to work without restrictions, the Arbitrator denies the petitioner's claim for TTD benefits beyond April 26, 2019. As a basis for his finding, the Arbitrator notes that the April and August 2019 surveillance shows that the petitioner was not truthful with her physicians regarding her actual physical capabilities. Despite her testimony that she is severely limited with walking, standing, lifting, and bending, she is seen on the surveillance footage performing all of these activities without difficulty. Unlike the petitioner's treating physicians, Dr. Mather had an opportunity to review this surveillance, as well as all of the prior treatment records, and he noted the clear inconsistencies. Therefore, the Arbitrator finds Dr. Mather's opinions to be more credible.

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

LAURA GILLIAM,

Petitioner,

vs.

NO: 15 WC 00843

FORD MOTOR COMPANY,

Respondent.

21IWCC0040

DECISION AND OPINION ON REVIEW

This matter comes before the Commission on Petitioner's review of Arbitrator Kane's order denying her petition for reinstatement. For the reasons set forth below, the Commission, after considering the record, hereby affirms the Arbitrator's order.

Findings of Fact

1. On January 13, 2015, Petitioner filed her Application for Adjustment of Claim alleging a date of accident/manifestation of October 28, 2014 regarding injuries to her hands, bilaterally.

2. During its pendency, this matter was set for trial on multiple occasions but failed to proceed due to a variety of reasons. RX1.

3. A specially-set trial date of March 19, 2018 was assigned by Arbitrator Kane, but the trial did not proceed as Petitioner was not prepared to testify. RX1.

4. Thereafter, Arbitrator Kane assigned a final trial date of June 20, 2018.

5. On June 20, 2018, Petitioner failed to appear for trial allegedly due to the need to attend a medical appointment for an unrelated knee condition.

6. As such, Arbitrator Kane dismissed the matter for want of prosecution.

7. On June 25, 2018, a timely Petition to Reinstate was filed by Petitioner. RX1-Ex. 2.

8. On July 23, 2018, the parties appeared before Arbitrator Kane who requested medical documentation be presented to verify Petitioner's medical appointment scheduled for June 20, 2018. T. 9-10.

9. On November 27, 2018, the parties appeared before Arbitrator Kane, and Petitioner presented medical records evidencing medical treatment on June 22, 2018 and not June 20, 2018. T. 10; PX1.

10. Thereafter, the Petition to Reinstate was entered and continued on several occasions- December 9, 2018; January 16, 2018; and February 19, 2019, at which time a record was made.

11. Arbitrator Kane denied reinstatement.

12. On March 5, 2019, Arbitrator Kane entered an order denying Petitioner's Petition to Reinstate.

13. On April 4, 2019, Petition filed a timely Petition for Review.

Conclusions of Law

Rule 9020.90 governs reinstatement and provides, in pertinent part:

> b) Petitions to Reinstate must be in writing. The Petition shall set forth the reason the cause was dismissed and the grounds relied upon for reinstatement. The Petition must also set forth the date on which the Petitioner will appear before the Arbitrator to present the Petition. A copy of the Petition must be served on the other side at the time of filing with the Commission in accordance with the requirements of Section 9020.70. The Respondent may file a response to the Petition.
>
> c) Petitions to Reinstate shall be docketed and heard by the same Arbitrator to whom the case is assigned. Both parties must appear at the time and place set for hearing. Parties will be permitted to present evidence in support of, or in opposition to, the Petition. The Arbitrator shall apply standards of fairness and equity in ruling on the Petition to Reinstate and shall consider the grounds relied on by the Petitioner, the objections of the Respondent, and the precedents set forth in Commission decisions. A record shall be made of a hearing on any contested Petition. *50 Ill. Adm. Code 9020.90.*

In considering the standards which govern reinstatements- fairness and equity, we affirm the Arbitrator's denial of Petitioner's Petition to Reinstate. Petitioner was provided ample opportunity to prosecute her claim and failed to do so. Moreover, when the matter was set for a final trial date, Petitioner failed to appear claiming the need to attend a medical appointment for an unrelated condition. This excuse, though, is not borne out by the medical

21IWCC0040

records provided by Petitioner. The records evidence she telephoned her physician on June 20, 2018 but did not seek treatment until June 22, 2018.

Given Petitioner's repeated lack of diligence in prosecution of her claim, the Commission affirms the denial of the Petition to Reinstate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's order denying reinstatement is hereby affirmed.

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." 820 ILCS 305/19(f)(2). Based upon the denial of compensation herein, no bond is set by the Commission.

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

DATED: JAN 2 6 2021

L. Elizabeth Coppoletti

LEC/cak

O: 11/18/2020

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Stephen Mathis

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on November 18, 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.

Thomas Tyrrell

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

Gema Solis,

Petitioner,

vs. NO: 16 WC 17861

Addus Healthcare,

Respondent.

21IWCC0041

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, prospective medical care, and permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 14, 2020, is hereby affirmed and adopted.

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

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

21IWCC0041

No bond for removal of this cause to the Circuit Court is required as no award for payment has been entered. 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: JAN 28 2021
o: 1/21/21
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Deborah L. Simpson

Marc Parker

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SOLIS, GEMA
Employee/Petitioner

Case# **16WC017861**

ADDUS HEALTHCARE
Employer/Respondent

21IWCC0041

On 4/14/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.29% 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:

2553 McHARGUE & JONES LLC
BRENTON M SCHMITZ
123 W MADISON ST SUITE 1800
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
KATERINA D KYROS
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

21IWCC0041

☐ 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

Gema Solis,
Employee/Petitioner

v.

Addus Healthcare,
Employer/Respondent

Case # **16** WC **17861**

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 **Wheaton**, on **February 28, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 21, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**32,799.52**; the average weekly wage was $**630.76**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **2** dependent children.

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

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

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

ORDER

The Arbitrator finds and concludes Petitioner failed to prove by a preponderance of the credible evidence she sustained accidental injuries which arose out of and in the course of employment and Petitioner failed to prove by a preponderance of the credible evidence her current condition of ill-being is causally related to her employment. Claim for compensation is therefore 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.

Robert M. Harris

Signature of Arbitrator Robert M. Harris
Date: April 7, 2020

ICArbDec p. 2

APR 14 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GEMA SOLIS Petitioner, vs. ADDUS HEALTHCARE Respondent.	)	21IWCC0041 No. 16 WC 17861

MEMORANDUM OF DECISION OF ARBITRATOR

Statement of Facts

Petitioner testified she was employed by Addus Healthcare in 2016. TX 11 She was employed in the position of payroll specialist. TX 12 Petitioner testified she spent approximately 90 to 95% of her workday doing data entry with some time processing actual payrolls. TX 12 What her job included was printing out stacks of timesheets and then processing them into the system on computers. TX 12 Her work environment included a keyboard, a mouse and three monitors. TX 12 – 13 Petitioner testified that although she had three computer screens, she mainly used only two of them. TX 13 The computer screens were set up with having one computer in front of her with the other two computers diagonal from the center computer. TX 13 The keyboard was right in front of her in front of the center computer. TX 14 Petitioner would also place the timesheets in front of her. TX 14

Petitioner testified she would manually enter the information from the timesheets into the system. TX 15 Petitioner testified she would do a motion of putting her neck down looking up at the monitor and then looking to the outside monitor to make sure the transactions went through. TX 15 Petitioner would also reach over to the keyboard, her timesheets and back to her keyboard. TX 15 – 16 Petitioner would then move her hand over to the mouse and back to the keyboard, back to the timesheets and then with her neck looking straightforward into the right look to the right monitor. TX 16 On average daily, Petitioner testified to completing approximately 100 to 150 timesheets. TX 18 For each timesheet Petitioner looked down approximately 30 times. TX 17 On cross-examination, Petitioner also acknowledged her job also required answering the phone

and taking phone calls. TX 43 Petitioner also agreed she had breaks throughout the day. TX 43

Petitioner testified that as she was doing her data entry work when she began to notice her right shoulder was hurting. TX 19 The pain was on the right side of her neck and down to her shoulder. TX 19 Sometimes the pain would go down her arm and down her back next to her right shoulder blade. TX 19 – 20

Petitioner testified that when she went to her doctor she told the truth about how she was feeling and what had occurred because she wanted to get better. TX 33 – 34

Petitioner completed an accident report for her employer on January 25, 2016. TX 20 Petitioner testified she did tell someone name Bernie about the accident but she could not recall when this happened or what Bernie's job title was. TX 21 Petitioner could not recall telling anyone at Addus Healthcare about her symptoms prior to January 25, 2016. TX 21 Petitioner signed an Employee Injury Report and Statement on January 25, 2016. RX 2 Petitioner reported that the accident occurred throughout the time that she had been employed there through repetitive motion. RX 2. Petitioner had been in this position for one year and five months. RX 2

Petitioner testified she began seeing her primary care doctor in October 2015. TX 20 Petitioner was evaluated at AMITA Medical Group on October 16, 2015 and was examined by Janine Tanner, APN. Petitioner complained of "posterior neck pain that radiates to both shoulders and the back of the skull for the past 24 hours. Yesterday morning she woke up without pain; brushed her teeth and the pain began scored at 7-8/10. Better today. Denies fevers, chills. Denies arm weakness, numbness or tingling…**Denies trauma or overuse."** RX 7 The assessment was "cervicalgia" and the **"Discussion" indicated "Probable muscle strain without trauma or overuse."** Petitioner was given prescriptions for Naproxen and Flexeril.

Petitioner was then seen on November 25, 2015 and was examined by Dr. Steven Rehusch. RX 7 Dr. Rehusch noted the following history: After Petitioner's previous October 16 visit, **"Her symptoms gradually resolved and she was asymptomatic until she awoke the morning of 11/19/15. At that time, she noticed right sided pain + tightness in right posterior neck, upper trapezius and right shoulder**. A little aching in the upper arm. No pains distal to the elbow and nothing at all on the left side. Denies numbness or weakness. **Denies a precipitating injury or possible overuse activity ("I have three men in my house. I don't shovel snow.")** She has no prior h/o neck/spine

problems." The Assessment/Plan was pain in cervical spine and an x-ray and physical therapy was recommended.

During a follow-up examination again with Janine Tanner, APN on January 4, 2016, the problems indicated pain in cervical spine. The history indicated, "Only current complaint continues to be posterior neck pain with right upper back discomfort; she has been several times for this problem. X-Rays have been negative. There was no trauma however she feels it is directly tied to ergonomic problems at the work place. She feels her right arm is too high above the keyboard and she is looking between 3 computer screens." Physical examination showed normal musculoskeletal exam with pain in cervical spine and right upper back-mild with palpation without erythema or edema. There is no radiculopathy. "Assessment/Plan" number 4 was "Pain in cervical spine." RX 7 Papers were filled out for work for ergonomics specialist to review her desk areas. RX 7 Notwithstanding Petitioner's personal "feelings" or opinions, **there is no comment or opinion from the APN regarding a work-related accident or causation.**

Petitioner was first seen by Dr. Gregory Drake on March 17, 2016. PX 2 Dr. Drake is an orthopedic surgeon. PX 2 The history Petitioner presented to Dr. Drake was: "She presents today for evaluation of her right sided neck pain which radiates to the right trapezial and shoulder blade regions. She attributes her symptoms to repetitive neck motion at work. She has 3 computer screens and has to turn her head frequently. She also utilizes a mouse in her right hand all day at work...Patient's description of injury: "repetitive trauma." The onset of symptoms occurred gradually over time. The injury was reported to her employer on Addus Homecare. The injury was reported to her employer on 1.21.16. Her symptoms have been present for 7 months." X-rays showed straightening of cervical lordosis and were otherwise normal. The Impression was "Sprain of ligaments of cervical spine." Dr. Drake noted Petitioner's MRi "does not demonstrate nerev root compression." Dr. Drake recommended dry needling as an alternative to the physical therapy that was performed in December (patient has already gone through physical theory with "minimal success") and physical therapy and potential future injections. TX 22; PX 2 **There is no comment or opinion from Dr. Drake regarding a work-related accident or causation.**

Petitioner visited Dr. Drake on March 5, 2016. PX 2 Petitioner reported her course of treatment was not helping and her symptoms grew worse. The Impression was "Sprain of ligaments of cervical spine, Bursitis of right shoulder/Scapulothoracic bursitis." Dr.

Drake's records indicate "She was provided with contact information for pain management for consideration of trigger point injections. Petitioner testified Dr. Drake referred her to Dr. Patel. TX 22 **There is no comment or opinion from Dr. Drake regarding a work-related accident or causation.**

Petitioner visited Dr. Drake on June 2, 2016. PX 2 Petitioner presented for review of her thoracic spine MRI performed on May 20, 2016 and she continued to complain of periscapular pain. Her pain has not responded to cortisone injection, dry needling or trigger point injections. She continues physical therapy. The MRI showed multilevel spondylosis without significant stenosis. The Impression was "Other intervertebral disc degeneration, thoracic region, the patient has periscapular strain. I do not see a disc herniation, nor do I believe she will require surgery." **There is no comment or opinion from Dr. Drake regarding a work-related accident or causation.**

Petitioner continued working for the employer through the time she was treating with Dr. Drake. TX 22 Petitioner also began a course of physical therapy at Athletico per Dr. Drake's recommendation. TX 23 Dr. Drake discharged Petitioner from his medical care on June 2, 2016 TX 36 **There is no comment or opinion from Dr. Drake regarding a work-related accident or causation.**

On June 1, 2016, the records from Athletico note Petitioner had been off work with vacation time and her son's surgery. PX 3, TX 37

Despite the medical treatment, and the fact that she moved her monitors around and put a desk tray underneath so she wouldn't have her arm raised up with her shoulder, Petitioner alleged that her pain was getting worse. TX 23 Addus Healthcare also provided Petitioner with a time sheet holder so that the sheets were not on the desk and she would not have to look down as low. TX 24

On June 11, 2016, Petitioner presented to the emergency department of St. Alexius Medical Center at 7:21pm. PX4. Petitioner complained of right shoulder and neck pain, beginning approximately five months ago and worsening over the last two days. Id. Petitioner was prescribed medication, released, and directed to follow up with her primary care physician. **The "Emergency Department Triage Form" dated 6/11/16 indicates "denies inj".** The "General Adult HPI" indicates, " 33 y/o presents to the ED c/o progressively worsening constant R sided "throbbing" shoulder pain which began 5 months ago and worsened within the last 2 days ago. Pt. states that the pain is exacerbated with turning her head and the pain also wakes her up in the middle of the

night at times. Pt reports intermittent "electricity" feeling that radiates down her RUE. Denies any recent trauma." Petitioner also had chest pains in the hospital and had related testing as a result. An EDM Note from 20:24 indicates, "pt states right shoulder pain and right neck pain since January. Pt denies any new injury. Pt states pain has been getting worse, and ice/heat is not helping. No deformity noted to shoulder or arm. Pt awaiting eval per Dr. Bluhm." **There is no comment or discussion regarding work, a work-related condition or causation in the hospital records.**

In June 2016, Petitioner hired an attorney who sent her to be seen at New Life Medical Center with a chiropractor, Dr. Dariusz Bialon. TX 25; PX 5. Petitioner presented to New Life Medical Center on June 15, 2016, four days after the emergency room visit. PX5. Petitioner testified to doing physical therapy and electrical stimulation at this facility until September of 2017, over 70 sessions, which she testified was helpful and provided relief. TX 26-27. Dr. Bialon's records also include multiple "Daily Therapy Notes" regarding each session. Dr. Bialon completed multiple forms regarding off-work status; each form has a box checked off "Work-Related" but no explanation or reasons were presented in any of these forms. On October 3, 2016 Dr. Bialon also completed a "Physician/Health Care Provider Certification" form regarding Petitioner's application for leave under FMLA. New Life Medical Center records also contain records from pain management specialist Dr. Neeraj Jain (various "Patient Statius Form" records have a "Work-Related Injury" box checked off, but no explanation or reasons were presented in any of these forms.

Dr. Bialon wrote a 4-page "Worker's (sic) Compensation Initial Evaluation Report" dated June 15, 2016. PX5. He wrote: "Mechanism of Onset: This injury is the direct result of a work-related accident...History of Injury: The patient's injury occurred when she suffered a neck and right shoulder injury from repetitive movements...Aggravating factors include working, repetitive motion, above head activity, and neck rotation..." [No description or discussion of these repetitive movements or what "working" activities were is included.] Dr. Bialon further wrote: "Causation: Ms. Solis' symptoms appear to have come as a result of a work related accident consistent with the one described in this report." [No description or discussion of how or why her symptoms "appear to have come as a result of a work related accident" is included.] A one-page hand-written note from Dr. Bialon dated June 15, 2016 - which is mostly illegible - notes "Repetitive motion – mostly data entry. Pt. uses(?) work station. Made her constantly (...?)."

Dr. Bialon saw Petitioner on multiple occasions and drafted similar reports for each visit. At the conclusion of each and every such report, Dr. Bialon included the following identical language: "Pursuant to Labor Code #4628, the following declaration is made: I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I have received from others. As to the information, I declare under penalty of perjury that the information accurately describes the information provided to me and except as noted herein, that I believe it to be true."

New Life Medical Center referred Petitioner to Dr. Jain, a pain management specialist at Pinnacle pain Management , who performed an injection into her shoulder in July of 2016, which helped. TX 27; PX 6. Petitioner reported improvement from her treatment at New Life and with Dr. Jain. TX 27 Dr. Jain wrote an "Initial Evaluation" dated July 13, 2016. The history indicates: "The patient...developed neck, shoulder and right upper extremity pain over several months...The patient complains of pain that has been gradual in onset. No specific provoking factor and attributes it to repetitive use of her right upper extremity vocationally...She is employed at Addus Healthcare and is a payroll specialist." **Dr. Jain's record does not indicate any discussion of Petitioner's specific job duties whatsoever.** Dr. Jain included the following paragraph in this report: "It is my opinion that the patient's symptoms for which she is being seen today are directly related to the injury. It is my opinion that the treatment rendered this far has been reasonable and of necessary frequency and duration. These opinions are stated to a reasonable medical probability. These opinions are based on patient's history, physical exam, imaging studies, and medical records that I have been provided and reviewed thus far. Delay in authorization adversely affects outcome in both terms of habituation to medication, psychological decline and affliction. It also decreases likelihood of functional return to work and symptom resolution.") Dr. Jain examined Petitioner on August 10, 2016, September 7, 2016, November 2, 2016, December 7, 2016, January 5, 2017, and March 17, 2017. **In each and every such office visit note, Dr. Jain includes the exact same opinion language, verbatim.**

Dr. Jain sent Petitioner to Dr. Tu for evaluation of her shoulder who did not recommend surgery. TX 37-38, RX 7, PX 6. Dr. Tu evaluated Petitioner on September 2, 2016 and noted Petitioner had right resolved shoulder pain and that she did not require any work restrictions and released her from his care. RX 7, PX 6. While Dr. Tu's "Initial

Evaluation" record does report Petitioner's own history suggesting symptoms were occurring while working, **Dr. Tu offers no opinions regarding accident or causal connection.**

Petitioner testified to returning back to Addus Healthcare for about a month in October 2016. TX 28. Petitioner testified she was terminated as there was no work available. TX 28 While employed by Addus Healthcare Petitioner did have group health insurance to which her employer contributed. TX 28

During the time that she was employed by Addus Healthcare from 2015 though 2017 Petitioner testified she was going to school to become a speech therapist. TX 29, 40 Petitioner took online classes as well as classes in person at night at the College of DuPage. TX 40-41 Petitioner testified she would go to work during the day and then go to classes in the evening. TX 41 Part of Petitioner's schooling was she had to use a computer and also study. TX 41 Petitioner had different types of books and materials. TX 41 Petitioner also had to type and use her computer while she was in school. TX 41 Petitioner testified that when she stopped working, she was still continuing to go to school at College of DuPage until May 2017. TX 41

In January 2017 Petitioner was put in clinical practice to complete hours to become licensed with the state to complete her degree. TX 29 Petitioner's clinical practice consisted of going to children's homes for early intervention services. TX 29. Petitioner testified she would go to probably 5 to 6 children's homes a day with her clinical supervisor and provide therapy services. TX 29. Petitioner is currently working as a speech therapist. TX 30

Petitioner testified regarding how her neck feels during the trial, "As I just sit here I'm fine." TX 30 Petitioner testified currently it's "sometimes a little difficult" to submit data on her clients. TX 30 Petitioner testified that when looking down at her computer she sometimes has difficulty. TX 31 Regarding her right shoulder, Petitioner testified, It's fine. Sometimes it hurts when I try to reach over my head or on the weekend when I vacuum it hurts." TX 31 Petitioner testified she will take Advil or Tylenol for her neck or shoulder. TX 31 Petitioner testified that she has no prescriptions for her neck or shoulder. TX 32 No doctor has ever recommended surgery for her conditions. TX 41 -42

Pursuant to Respondent's request under Section 12, Petitioner was examined by Dr. Thomas Gleason, an orthopedic surgeon, on August 30, 2016, who issued a report. RX 4 At the time of the examination Petitioner complained of neck and right shoulder

pain which had partially improved but had plateaued. Rx 4 Dr. Gleason performed a physical examination on Petitioner, reviewed voluminous medical records and reviewed diagnostic studies. RX 4 Dr. Gleason noted Petitioner had no positive objective findings on physical examination relative to the cervical spine and upper extremities. RX 4 Dr. Gleason opined Petitioner did not sustain a repetitive work injury on or around January 22, 2016 nor did she have any positive objective findings on physical examination to substantiate subjective complaints with respect to her neck and right shoulder. Rx 4 Dr. Gleason noted that no current diagnosis was causally related to any repetitive work injury of January 22, 2016. Rx 14 Dr. Gleason specifically noted Petitioner had complaints on October 16, 2015 after brushing her teeth in the morning and denying any repetitive injury. Rx 4 Furthermore, Dr. Gleason opined that Petitioner's job activities were not a contributing factor to her current condition as she had no positive objective findings on physical examination suggesting a symptomatic pathologic condition. Rx 4

Dr. Gleason also noted to the extent that Petitioner had any occasional aches or pain related to the neck or shoulders, those would be consistent with normal aches and pains related to activities of everyday life and the aging process as reflected in the MRI scans. RX 4 Therefore, it was his opinion that no repetitive work injury aggravated a pre-existing condition. Rx 4 Dr. Gleason did not relate any medical treatment to a reported January 22, 2016 repetitive injury and did not feel that any additional medical treatment would be reasonable and necessary. RX 4 Additionally, there were no physical limitations or work restrictions needed as a result of the alleged January 22, 2016 repetitive work injury. RX 4 Finally, Dr. Gleason noted if Petitioner had any injury relating to her neck or right shoulder dating back to October 16, 2015 that would have reached MMI within a period of 6- 8 weeks. RX 4

A retroactive Utilization Review/peer clinical review report was performed pursuant to Section 8.7 (RX 5) concerning the chiropractic treatment provided by Dr. Bialon from June 15, 2016 through August 2, 2017 (covering approximately 73 visits). The UR report indicated those visits were found to be non-certifying (denied) as there was "no clear documentation of lasting derived functional benefit or documentation to support exceeding the guideline recommendation."

Issue C. Did an accident arise in and out of course of employment? The Arbitrator finds and concludes as follows:

Initially, the Arbitrator incorporates and adopts all the facts and notes included in the above Statement of Facts section into all sections herein and below.

The Arbitrator finds and concludes Petitioner failed to prove by a preponderance of the credible evidence that she sustained an accidental injury which arose out of and in the course of her employment with Respondent on January 21, 2016. Petitioner based her claim on a "repetitive trauma" theory of recovery and the Arbitrator specifically finds and concludes Petitioner failed to prove by a preponderance of the credible evidence that she sustained an accidental injury based on a "repetitive trauma" claim.

This claim essentially requires an assessment of competing and conflicting medical opinions and other facts in order to resolve the threshold disputed issues of accident and causal connection. That is the task of the Commission and this Arbitrator. That assessment is necessary because the medical nature of this claim - repetitive trauma - is complex and requires the knowledge and expertise of credible expert medical opinions regarding these disputed issues. This is not the type of claim where the Arbitrator could, on his own, or any lay person, assess causation absent the assistance of expert medical opinions and evidence. While Petitioner credibly testified she suffered injuries which ***she described*** were likely of a repetitive nature and related to her alleged repetitive work duties, causing her to seek treatment in October 2015, **Petitioner is obviously not qualified - nor permitted - to render a medical opinion regarding accident or causation**. That is precisely why the quality and credibility of the proffered expert medical opinions and evidence must be carefully assessed and is so vital to the determination of the disputed case issues.

The claimant in a worker's compensation proceeding has the burden of proving by a preponderance of the credible evidence that he suffered an accidental injury which arose out of and in the course of his employment. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 480 (1989). An injury is considered "accidental" under the Act if it is caused by the performance of a claimant's job, even though it develops gradually over a period of time as a result of repetitive trauma. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 529-30 (1987); *Fierke v. Industrial Comm'n*, 309 Ill. App.3d 1037, 1040 (2000). A claimant alleging a repetitive trauma need not prove a specific traumatic

injury or a "final, identifiable episode of collapse" during which the claimant's bodily structure suddenly gave way. *Luttrell,* 154 Ill. App.3d at 957. However, an employee who alleges injury based on repetitive trauma must meet the same standard of proof as other workers' compensation claimants alleging "accidental injury"; there must be a showing that the injury is work-related and not a result of the normal degenerative aging process. *Peoria County Belwood Nursing Home*, 115 Ill. 2d at 530; *Edward Hines Precision Components*, 356 Ill. App. 3d at 194. The date of injury in repetitive trauma cases is the date on which the injury manifests itself, meaning the date on which the fact of the injury and the causal relation to work would have become plainly apparent to a reasonable person. *Edward Hines Precision Components*, 356 Ill. App. 3d at 194. *Campbell v. Ill. Workers' Comp. Comm'n,* 2018 IL App (3d) 170725WC-U (Ill. App. 2018)

"An expert's opinion is only as valid as the bases and reasons for the opinion. Where there is no factual support for an expert's conclusions, his conclusions alone do not create a question of fact." *Damron v. Micor Distributing*, 276 Ill.App.3d 901, 907 (1995); "...an expert witness' opinion cannot be based on mere conjecture and guess." *Damron,* 276 Ill.App.3d at 907. "Conjecture" is defined as "a conclusion based on assumptions not in evidence or contradicted by the evidence." *Simers v. Bickers*, 260 Ill. App. 3rd 406, 412 (Ill. App. 4th Dist. 1994).

"The trial court is not required to blindly accept the expert's assertion that his testimony has an adequate foundation. Rather, the trial court must look behind the expert's conclusion and analyze the adequacy of the foundation." *Simers v. Bickers,* 260 Ill.App.3d at 411 (1994). "The weight accorded an expert's opinion must be measured by the facts supporting the opinion and the reasons given for his or her conclusions." *Doser v. Savage Manufacturing and Sales, Inc.*, 142 Ill. 2d 176, 196 (Ill. Sup. Ct. 1990). If an expert's opinion lacks a factual basis, the opinion deserves little weight. *Ibid.* An expert cannot base his opinions on what might have happened. *Dyback v. Weber*, 114 Ill.2d 232, 244-45 (Ill. Sup. Ct. 1986). An expert's opinions cannot be based on conjecture and guess where he does not possess the necessary factual basis to form his opinion. "Where there is no factual support for an expert's conclusions, his conclusions alone do not create a question of fact." *Damron v. Micor Distributing*, 276 Ill.App.3d 901, 907.

In *James Del Ricco v. Central Rug & Carpet Co.*, 10 IWCC 0441, the Commission held: "The Commission has repeatedly stated that in cases of repetitive trauma injuries,

which Petitioner appears to assert here, there *must* be expert medical opinion establishing the connection between the work and the injury for a claim to recover. See, e.g., *Selburg v. Peoria Ear, Nose & Throat,* 09 IWWC 0507, **"...A condition as complex as carpal tunnel syndrome requires more than the Petitioner's testimony that she noticed her symptoms after performing certain job duties."** See also, *Hurst v. Cingular Wireless*, 097 IWWC, *Russell v. Ruth Staffing Services*, 03 IIC 0034. But here, Petitioner did not present competent, sufficient and credible expert medical evidence and opinions establishing the connection between her work duties and her conditions of ill-being.

"In cases relying on the repetitive-trauma concept, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Williams V. Industrial Commission,* 244 Ill. App. 3rd 204 at 209, 614 N.E. 2d at 180, 185 Ill. Dec. 46 (1st Dist. 1993). "There ***must*** be a showing that the injury is work-related and not the result of a normal degenerative aging process." *Ibid.* The Court in *Williams* found that Petitioner failed to prove and ***conclusively establish a repetitive job task***. In prior cases where compensation was awarded, the Petitioner had proven that he performed the ***same task in a repetitive fashion on a daily basis*** – thus establishing the "repetitive" nature of each job task. *Williams,* 244 Ill. App. 3rd 204 at 209. It must be emphasized that in *Williams*, compensation was denied in a repetitive trauma carpal tunnel syndrome claim, because Petitioner's treating physician ***did not demonstrate a full understanding of Petitioner's job duties.*** That is the identical scenario presented here with Petitioner's experts who lacked a meaningful and complete understanding of Petitioner's actual job duties. Further, the *Williams* Court denied compensation because there was ***conflicting medical evidence as to the cause of the injury***. That again is the identical scenario presented here.

Claims under the repetitive trauma theory ***require*** a medical causal connection opinion. The Commission so held in *Connie Selburg v. Peoria Ear, Nose & Throat*, 08 WC 20615, 09 IWCC 0507, "In repetitive trauma cases, the Commission **requires** claimants to provide medical evidence of causal connection between the accident and the injury" citing to *Russell v. Ruth Staffing*, 03 IIC 0034 (2003). *Tokar v. All Town,* 07 IWCC 0621, "***In repetitive trauma cases, Claimants must provide medical evidence of causal connection between the accident and injury."*** Petitioner herein failed to

provide credible and persuasive medical evidence of causation between the alleged accidents and the injuries.

Further, claims under the repetitive trauma theory require a medical opinion that the job duties caused the condition, and ***that medical opinion offered must be based upon a sound knowledge of the actual job duties***. *Gora v. State of Illinois, Dept. of Transportation*, 05 IWCC 901, citing to *Williams v. Pekin Police Dept.*, 01 IIC 96. In *Gora*, compensation was denied in a repetitive trauma carpal tunnel syndrome claim as there was no evidence Petitioner ever discussed his job duties with treating doctors ***in detail***. Not only would Petitioner need a medical opinion that the job duties caused the condition, but that opinion ***must be based upon a sound knowledge of the actual job duties.*** That "sound knowledge" scenario is clearly lacking here.

There is no requirement that the testimony (or as in this case, the opinions) of a treating physician must be given greater weight than the testimony of a physician who has examined the employee solely for the purpose of testifying (as in this case, a Section 12 examining expert). *Pollard v. Indus. Comm'n*, 91 Ill. 2d 266, 277, 437 N.E. 2d 612, 617, 62 Ill. 2d 924, 929 (1983). Accordingly, the Arbitrator, after carefully reviewing the medical evidence in the record, including the conflicting evidence and opinions, and weighing those opinions against the overall facts of the case, including Petitioner's testimony and the histories she gave to her medical providers, finds and concludes the opinions of Respondent's examining expert Dr. Gleason are afforded greater weight, reliance and credibility than those of treating physician Dr. Jain and treating chiropractor Dr. Bialon.

Petitioner seeks to discredit the opinions of Respondent's Section 12 examiner Dr. Gleason. Petitioner offers only the two arguments that follow: (1) "Dr. Gleason did not opine on the Petitioner's job activities in any way and did not present any statement that he even knew what Petitioner's job activities were, other than "repetitive movement when using two monitors, a keyboard, and a mouse."" Petitioner next argues (2) Dr. Gleason "stated that he reviewed a March 2, 2016 job description but did not report his understanding of the job activities at all." Regarding the first argument, this is an inaccurate statement. Dr. Gleason did in fact opine on the Petitioner's job activities, several times: "1. It is my opinion that there was no repetitive work injury on or around January 22, 2016." Next, "3. It is my opinion that Ms. Solis' job duties are not a

contributing factor to her current diagnosis." Next, "It is my opinion that there was no repetitive work injury which aggravated a pre-existing condition." Regarding the second argument, while it is correct Dr. Gleason did not specifically report his understanding of the job activities found in the March 2, 2016 job description, he was never challenged by anyone regarding what his understanding was and at least **it is agreed that he did review the job description - while the record shows no other medical provider did so – an inconvenient fact Petitioner does not mention.**

Nor does Petitioner assert or argue that the job description - admitted into evidence without any objection TX 51- is in any way inaccurate, misleading, not credible, etc. Dr. Gleason asserted that he reviewed all of the records, including the job description, and direct interview of Petitioner, and he based his opinions in part on all of this. That was never challenged.

Petitioner was evaluated by two orthopedic doctors (Dr. Drake and Dr. Gleason) neither of whom provided causation opinions to relate Petitioner's condition to her work activities. Dr. Drake was her treating physician with whom she selected to treat her and released her from care in June 2016. **The Arbitrator emphasizes there is no comment or opinion from Dr. Drake regarding any work-related accident or causation.**

Dr. Gleason specifically opined Petitioner did not sustain a repetitive work injury on or around January 22, 2016, nor did her work injury contribute or aggravate her condition as she did not have any positive objective findings on physical examination to substantiate subjective complaints with respect to her neck and right shoulder.

Petitioner was examined and treated by three more medical doctors, a chiropractor and an APN: Dr. Tu, Dr. Jain, Dr. Rehusch, chiropractic physician Dr. Bialon, and Janine Tanner. Regarding these five medical providers, only Dr. Jain and chiropractic physician Dr. Bialon offer a causal connection opinion which the Arbitrator finds are very flawed and fundamentally lack weight and credibility and lack a solid foundation.

1. **Janine Tanner, APN, offered no comment or opinion regarding a work-related accident or causation.** Petitioner in fact actually told Tanner she "**Denies trauma or overuse.**" The Arbitrator places significant weight on this evidence.
2. While Dr. Tu's "Initial Evaluation" record does report Petitioner's **own history** suggesting symptoms were occurring while working, **Dr. Tu offers no**

opinions regarding accident or causal connection. The Arbitrator places significant weight on this evidence.

3. **Regarding Dr. Rehusch, he noted, "Her symptoms gradually resolved and <u>she was asymptomatic until she awoke the morning of 11/19/15</u>. At that time, she noticed right sided pain + tightness in right posterior neck, upper trapezius and right shoulder. <u>Denies</u> a precipitating injury or <u>possible overuse activity</u> ("I have three men in my house. I don't shovel snow.")** The Arbitrator places significant weight on this evidence.
4. **When Petitioner was hospitalized in June, 2016, there is no comment or discussion regarding work, work symptoms or problems, a work-related condition or causation in the hospital records.** The Arbitrator places significant weight on this evidence.
5. In June 2016, Petitioner hired an attorney who sent her to be seen at New Life Medical Center with a chiropractor, Dr. Dariusz Bialon. TX 25; PX 5. Petitioner presented to New Life Medical Center on June 15, 2016, four days after the emergency room visit. Dr. Bialon completed multiple forms regarding off-work status; each form has a box checked off "Work-Related" **but there are no explanations or reasons were presented in any of these forms.** On October 3, 2016 Dr. Bialon also completed a "Physician/Health Care Provider Certification" form regarding Petitioner's application for leave under FMLA. Dr. Bialon wrote a 4-page "Worker's (sic) Compensation Initial Evaluation Report" dated June 15, 2016. PX5. He wrote: "Mechanism of Onset: This injury is the direct result of a work-related accident…History of Injury: The patient's injury occurred when she suffered a neck and right shoulder injury from repetitive movements…Aggravating factors include working, repetitive motion, above head activity, and neck rotation…" The Arbitrator emphasizes there is **<u>nowhere</u> a description or discussion of these "repetitive movements" or what the "working" activities were**. This striking absence serves to seriously undermine the credibility of Dr. Bialon's repeated, identical opinions. Dr. Bialon further wrote: "Causation: Ms. Solis' symptoms appear to have come as a result of a work related accident consistent with the one described in this report." **The Arbitrator again emphasizes there is <u>no</u> description or discussion of how or why her symptoms "appear to have come as a result**

of a work related accident". This striking absence serves to seriously undermine the credibility of Dr. Bialon's repeated, identical opinions. There simply is no foundation presented, and absent any adequate and credible foundation, there is no credible opinion. A one-page hand-written note from Dr. Bialon dated June 15, 2016 - which is mostly illegible - notes "Repetitive motion – mostly data entry. Pt. uses(?) work station. Made her constantly (...?)." Dr. Bialon saw Petitioner on multiple occasions and drafted similar reports for each visit. **At the conclusion of each and every such report, Dr. Bialon included the following identical language:** "Pursuant to Labor Code #4628, the following declaration is made: I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I have received from others. As to the information, I declare under penalty of perjury that the information accurately describes the information provided to me and except as noted herein, that I believe it to be true." **The Arbitrator notes it is odd and inexplicable why Dr. Bialon includes this language in his office visit notes and it does not bolster his credibility.** Dr. Bialon does not explain why he does so or what this means; however, the Arbitrator takes judicial notice that "Labor Code #4628" apparently refers to a California statute in its Labor Code section concerning Workers' Compensation and Insurance regarding medical-legal reports. This language has no relevance or authority in Illinois and again the Arbitrator questions why this language is inserted in Illinois treating medical records – if not to indicate these reports are of a "medical-legal" nature.

6. New Life Medical Center referred Petitioner to Dr. Jain, a pain management specialist at Pinnacle pain Management. TX 27; PX 6. Dr. Jain wrote an "Initial Evaluation" dated July 13, 2016. The history indicates: "The patient...developed neck, shoulder and right upper extremity pain over several months...The patient complains of pain that has been gradual in onset. No specific provoking factor and attributes it to repetitive use of her right upper extremity vocationally...She is employed at Addus Healthcare and is a payroll specialist." **The Arbitrator places significance and emphasis on the fact that Dr. Jain's record does <u>not</u> include <u>any</u> discussion of Petitioner's**

specific job duties whatsoever. Therefore, Dr. Jain provided **no foundation** for his causation opinions and **no foundation** for the basis of his understanding (if any) of Petitioner's history and job duties. Further, Dr. Jain included the following paragraph in this report: "It is my opinion that the patient's symptoms for which she is being seen today are directly related to the injury. It is my opinion that the treatment rendered this far has been reasonable and of necessary frequency and duration. These opinions are stated to a reasonable medical probability. These opinions are based on patient's history, physical exam, imaging studies, and medical records that I have been provided and reviewed thus far. Delay in authorization adversely affects outcome in both terms of habituation to medication, psychological decline and affliction. It also decreases likelihood of functional return to work and symptom resolution.") Dr. Jain examined Petitioner on August 10, 2016, September 7, 2016, November 2, 2016, December 7, 2016, January 5, 2017, and March 17, 2017. **In each and every such office visit note, Dr. Jain includes the exact same opinion language, verbatim.** The **Arbitrator emphasizes:** Although these records do not indicate Dr. Jain was specifically asked to offer any opinions, **he did so nonetheless**, in each and every office visit note. **The Arbitrator questions why**. It is clear Dr. Jain offered these opinions for the sole purpose of anticipating litigation. There can be no other reason, as such opinions are not usual nor necessary to be included in office visit notes. This further clearly provides the Arbitrator good reason to discredit his opinions – which, incidentally, are based on almost no foundation, being further reason sufficient to discredit his opinions as well.] New Life Medical Center records also contain records from Dr. Jain -various "Patient Status Form" records have a "Work-Related Injury" box checked off, **but no explanation or reasons were presented in any of these forms as to why this is a "Work-Related Injury". Again, this is another clear example of an opinion that has no foundation.**

As noted above, Petitioner advised at least two of her own treating medical providers (Dr. Rehusch and APN Tanner) she denied "overuse"- which is the very basis of her repetitive trauma claim. The Arbitrator finds these examples of denial of overuse a significant factor weighing against her credibility. Petitioner

obviously was not consistent in reporting her symptoms and history to her treating medical providers. Also, the Arbitrator emphasizes there is no evidence in the record that Petitioner ever attempted to dispute the veracity of these denial statements, either in a written form or in her testimony.

The Arbitrator finds the opinions of Dr. Gleason, an orthopedic surgeon, more credible than those of Dr. Bialon, a chiropractor, and Dr. Jain, the pain management specialist.

Additionally, the Arbitrator notes Petitioner began treating in October 2015 when she gave a history of experiencing pain in her neck and shoulder after brushing her teeth. Petitioner did not relate her complaints to her work. During her follow-up visits in 2015 she denied any precipitating injuries or overuse syndrome. Dr. Gleason also supports that history of accident Petitioner provided of having pain after brushing her teeth.

Furthermore, the Arbitrator notes Petitioner was engaged in substantially similar activities while obtaining her speech therapist degree during the entirety of the time that she complained that her work activities were contributing to her pain. Therefore, it would be speculative to determine whether it was her work activities or her school activities which were contributing to this pain. It is well settled that liability under the Act cannot be premised on speculation or conjecture but must be based solely on the facts contained in the record. *Albrecht v. Industrial Commission*, 271 Ill.App.3d 756, 760 (1995)

Issue E. Was timely notice of the accident given to Respondent?

The Arbitrator finds and concludes the issue of notice is moot as Petitioner failed to prove she sustained an accident which arose out of and in the course of employment and failed to prove a causal connection exists between her current condition of ill-being and the alleged accident and her work activities.

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

The Arbitrator finds and concludes the issue of causation is moot as Petitioner failed to prove she sustained an accident which arose out of and in the course of employment with Respondent. However, for the sake of thoroughness regarding causation, the Arbitrator notes as follows:

Petitioner argues in favor of causation in part, as follows: "Petitioner testified she believed her issues were due to the repetitive and ergonomically unfortunate nature of her work." The Arbitrator emphasizes the obvious that Petitioner is plainly not qualified to offer a causation opinion (which is a medical opinion) and Petitioner's argument therefore has no merit.

The Arbitrator finds and concludes the opinions of orthopedic surgeon Dr. Gleason, are more credible, reliable and weighty than those of chiropractor Dr. Bialon and Dr. Jain The Arbitrator also emphasizes no other treating medical provider provides a causation opinion. The opinions of Dr. Jain and chiropractor Dr. Bialon are less credible, weighty and reliable than those of Dr. Gleason and the reasons why are explained above in the "Accident" section.

Further, Dr. Gleason specifically noted that Petitioner had prior complaints on October 16, 2015 after brushing her teeth in the morning and denying any repetitive injury. RX 4. Furthermore, he opined that her job activities were not a contributing factor contributing to her current condition as she had no positive objective findings on physical examination suggesting a symptomatic pathologic condition. RX 4 Dr. Gleason also noted to the extent that Petitioner had any occasional ache or pain related to the neck or shoulders, those would be consistent with normal aches and pains related to activities of everyday life aging process as reflected in the MRI scans not an alleged work condition. RX 4 Therefore he opined that no repetitive work injury aggravated a pre-existing condition. RX 4

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

The Arbitrator finds and concludes the disputed issue of medical is moot as Petitioner did not prove she sustained an accident and she did not prove her current condition of ill-being is causally related to her work activities. Further, Dr. Gleason did not relate any medical treatment to the alleged work accident, and therefore the Arbitrator awards no medical benefits.

Furthermore, the Arbitrator notes that even if compensability were found, the medical treatment and bills from New Life Medical Center (excessive chiropractic

treatments number over 70) would not be awarded as a valid Utilization Review found that the multiple sessions were not certified and exceeded the guidelines. Petitioner presented an argument against some of its findings and conclusions yet did not take the better opportunity to depose its author. Notwithstanding Petitioner's criticism, the Utilization Review was admitted into evidence without objection. No medical expert specifically reviewed the Utilization review and therefore Petitioner offered no expert medical opinions or medical rebuttal evidence to specifically contradict the denial recommendation and conclusions in this Utilization Review.

Issue K. What temporary benefits are in dispute? TTD

The Arbitrator finds and concludes that the issue of TTD is moot as Petitioner did not prove she sustained an accident and did not prove her current condition of ill-being was related to her employment. Further, Dr. Gleason credibly opined no work restrictions were reasonable and necessary.

The Arbitrator notes that even if Petitioner had sustained a compensable injury that TTD should not be awarded as Petitioner continued to be engage in substantially the same activities as her work while continuing to undergo schooling. Furthermore, the Arbitrator finds it suspect that Petitioner could continue to engage in school activities but could not continue a desk job using the same equipment despite undergoing medical treatment and provided with the adjustments recommended by Dr. Bialon, the chiropractor, for modifications to her desk. Very significantly, Dr. Drake, Petitioner's own treating orthopedic doctor released Petitioner to work without restrictions prior to the claimed period of TTD.

Additionally, any award for TTD would be based on speculation as Petitioner testified she returned to work for approximately 1 month during October, 2016 but did not provide the start day or end date of this employment or any specificity of time. As previously noted, it is well settled that liability under the Act cannot be premised on speculation or conjecture but must be based solely on the facts contained in the record. In light of the fact that an award for TTD would be based on speculation, TTD cannot be awarded.

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

The Arbitrator finds and concludes the issue of nature and extent is moot as Petitioner did not prove she sustained an accident and Petitioner did not prove her current condition of ill-being is causally related to her employment.

Issue O. Choice of physicians

The Arbitrator finds and concludes the issue of choice of physician/two doctor rule is moot as Petitioner did not prove she sustained an accident and Petitioner did not prove her current condition of ill-being is causally related to her employment.

Robert M. Harris

Robert M. Harris, Arbitrator

Date: April 7, 2020

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

MIRJANA GRUJICIC,

Petitioner,

vs.

NO: 02 WC 07703
08 WC 13557
11 WC 02050

CITY OF CHICAGO,
DEPARTMENT OF STREETS & SANITATION,

Respondent.

21IWCC0042

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 temporary total disability-(duration only), and other-award of maintenance and vocational rehabilitation, 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 March 8, 2019, is hereby affirmed and adopted.

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

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: JAN 29 2021
o-1/26/21
KAD/jsf

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

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

GRUJICIC, MIRAJANA
Employee/Petitioner

Case# **02WC007703**

08WC013557
11WC002050

CITY OF CHICAGO
Employer/Respondent

21IWCC0042

On 3/8/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.46% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Mirajana Grujicic
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **02 WC 07703**

Consolidated cases: **08 WC 13557**
11 WC 02050

21IWCC0042

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **10/17/18 and 1/17/2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the dates of accident, **1/23/02, 2/29/08, 1/3/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

The parties deferred the issue of causation until such time that permanency is addressed. T. 10/17/18, p. 7.

In the year preceding the last injury (of 1/3/11), Petitioner earned $**65,840.44**; the average weekly wage was $**1,265.97**.

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

This hearing was held for a limited purpose, i.e., to have the Arbitrator determine whether Petitioner complied with vocational rehabilitation and is entitled to additional vocational rehabilitation and maintenance along with penalties and fees. The parties agree Respondent paid substantial weekly benefits in the past, along with maintenance until March 8, 2018 plus an additional $3,737.80 during the trial, due to a scheduling conflict that resulted in the need for a continuance. They deferred the issues of causation, incurred medical expenses and Respondent's entitlement to 8(j) credit. T. 10/17/18, pp. 6-8. T. 1/17/19, pp. 6-7.

ORDER

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner was, overall, cooperative with vocational rehabilitation and is entitled to additional vocational rehabilitation for a period of nine months (see Donald Margraff v. State, 16 IWCC 833), with a new provider. The Arbitrator views Petitioner and the original provider, Vocamotive, as being at an impasse. The Arbitrator recommends that the parties confer in an effort to agree upon a new provider. To avoid duplication of effort and costs, the new provider should be provided with Joseph Belmonte's initial assessment and the results of the vocational testing conducted by James Boyd. Petitioner is directed to comply with the new provider's rules concerning attendance, documentation of effort and computer usage. Petitioner is also directed to make a concerted effort to schedule non-accident-related medical and dental care on days when she is not already scheduled to participate in vocational rehabilitation or attend a job interview or job fair.

As noted above, the parties agree Respondent paid maintenance benefits from July 23, 2016 through March 8, 2018. Arb Exh 1. The Arbitrator finds that Petitioner is entitled to additional maintenance benefits at the rate of $843.98 per week from March 9, 2018 through January 17, 2019, with Respondent receiving credit for its recent payment of $3,737.80.

For the reasons set forth in the attached decision, the Arbitrator declines to find Respondent liable for penalties and fees.

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

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

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

Molly C Mason

Signature of Arbitrator

3/8/19
Date

ICArbDec19(b)

MAR 8 - 2019

Mirajana Grujicic v. City of Chicago
02 WC 7703, 08 WC 13557 and 11 WC 2050 (consolidated)

Procedural and Medical Background

Petitioner began working as a motor truck driver for Respondent in 1996. She sustained injuries in a work-related collision in 2002. As a result of these injuries, she underwent anterior cervical discectomies and fusions in 2002 and 2003 (performed by Dr. Goldberg). In March of 2006, Petitioner began seeing Dr. Ghanayem of Loyola. On August 22, 2006, Dr. Ghanayem performed a repeat anterior cervical decompression/discectomy at C5-C6, followed by a repeat fusion. Following a course of therapy and work conditioning, Petitioner resumed her former motor truck duties on August 1, 2007 but remained symptomatic. She sustained another work accident on February 29, 2008 and resumed seeing Dr. Ghanayem, along with a physical medicine specialist, Dr. Rosania, thereafter. Following a Section 12 examination, Petitioner resumed full duty in September 2010. She testified she did so against Dr. Ghanayem's advice. She sustained a third work injury on January 3, 2011. Petitioner returned to Dr. Ghanayem after this injury. He took her off work and recommended additional care with Dr. Rosania. After another Section 12 examination, a dispute arose as to work capacity and the need for additional care. Respondent's examiner, Dr. Singh, opined that the previous cervical fusions from C3-C6 were solid and that any lumbar spine condition was pre-existing and degenerative in nature. He found Petitioner to be at maximum medical improvement and capable of full duty. Dr. Ghanayem disagreed. He recommended restrictions and additional conservative care.

The Arbitrator conducted a 19(b) and 8(a) hearing in these claims in 2012. In decisions issued on February 28, 2012, the Arbitrator found that Petitioner was credible and that she established causation. The Arbitrator awarded temporary total disability benefits, medical expenses and prospective pain management, as recommended by Drs. Ghanayem and Rosania. Neither party filed a review.

On May 13, 2013, Dr. Ghanayem noted that Petitioner was experiencing more neck problems, some balance-related problems when walking and a little clumsiness in her hands. He reviewed a recent repeat cervical spine MRI and noted developing stenosis below the C7-T1 fusion. He recommended additional surgery, "given the early myelopathic findings of some clumsiness in [Petitioner's] hands and difficulty with gait, along with stenosis and cord compression at the C6-7 level." He indicated that these problems were "simply going to get worse over time." He recommended an anterior cervical discectomy and fusion at C6-7. PX 5. On July 7, 2014, Dr. Ghanayem noted that Petitioner was still experiencing neck pain. He also noted she was walking with the use of a cane and continuing to complain of balance issues. He prescribed a repeat cervical spine MRI and again recommended surgery at the C6-C7 level. PX 5.

Petitioner underwent a functional capacity evaluation at Fyzical Therapy on July 30 and 31, 2015. The evaluator described Petitioner as fully cooperative and exhibiting "no indication of symptom magnification." He found her capable of working at a light physical demand level. PX 5. On August 10, 2015, Dr. Ghanayem found Petitioner capable of returning to work at a light physical demand level. He described this restriction as permanent. PX 5. He subsequently found Petitioner to be at maximum medical improvement with respect to her lumbar spine and recommended she continue seeing Dr. Rosania for pain management. PX 5.

Joseph Belmonte, a certified vocational rehabilitation counselor and president of Vocamotive, conducted an evaluation of Petitioner in August 2016. He found Petitioner employable and

recommended that rehabilitation services be provided. Following vocational testing and computer-related training, Petitioner began a job search via Vocamotive in early 2017. Not long thereafter, Respondent discontinued benefits due to attendance-related issues. The Arbitrator met with Petitioner and both counsel on April 25, 2017 to try to resolve these issues and move the case forward. Rehabilitation efforts resumed following this meeting.

Throughout the lengthy period described above, Petitioner underwent extensive treatment for various medical conditions. Her testimony concerning that treatment is summarized below.

Summary of Current Disputed Issues

Respondent contends Petitioner became uncooperative with vocational rehabilitation in December 2017, based on Belmonte's reporting. Respondent discontinued paying maintenance on March 8, 2018 but, due to the need for a continuance, later issued an additional check in the amount of $3,737.80, covering a period from mid-December 2018 through mid-January 2019. Petitioner seeks reinstatement of vocational rehabilitation, retroactive maintenance and penalties and fees. The parties deferred causation, medical expenses and nature and extent, along with 8(j) credit. T. 10/17/18, pp. 4-8. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified she graduated from high school in 1979. T. 10/17/18, pp. 21, 27.About a year later, she enrolled in Columbia College, where she majored in arts and entertainment management. T. 10/17/18, pp. 21-22. She dropped out after a year and a half, at which point her parents sent her to stay with relatives in Europe. She stayed in Europe for about a year, during which time she got married. In approximately 1983, she returned to Chicago and began working for Maintenance Service, performing cleaning at Loyola Medical Center and various offices. T. 10/17/18, pp. 24-25. She took some time off after her daughter was born in 1984 and then resumed working, initially for Maintenance Service again and then for Loyola. In approximately 1985 or 1986, she attended some night classes, including accounting, at Daley. T. 10/17/18, pp. 25, 27. She never obtained a college degree. T. 10/17/18, p. 26. During this same time period, she obtained her real estate license and tried to sell real estate. This lasted less than a year. T. 10/17/18, pp. 26-27. She no longer has a license. T. 10/17/18, p. 26. During various periods prior to 1996, she worked as a sandwich maker, limousine driver, delivery person and seasonal Postal Service employee.

Petitioner testified she obtained a CDL license in 1989, after her second son was born. She and her now ex-husband owned and operated a long-distance trucking business. They hauled sand and gravel. She also drove a truck that her mother owned. She did not perform any loading while working as a truck driver. T. 10/17/18, pp. 14-15.

Petitioner testified she began working for Respondent in 1996. She was initially hired as a seasonal motor truck driver. She was temporarily laid off in April 1997 but was called back later that year, at which point she started working full-time, at night, in a Streets and Sanitation truck yard on 52nd Street. T. 10/17/18, p. 30. She ran the yard, checking the fuel, dumping and repair status of various Respondent-owned trucks. T. 10/17/18, pp. 16-17. She also drove trucks to various dumps and operated snow plows and garbage trucks. T. 10/17/18, pp. 18-19. She worked overtime during "snow calls." T. 10/17/18, p. 19.

Petitioner testified she was still working as a motor truck driver as of her last work accident on January 3, 2011. She has not worked in any capacity since that date. T. 10/17/18, p. 20. Since January 2011, she has gained approximately 50 to 60 pounds. T. 10/17/18, p. 35. She currently weighs 300 to 310 pounds. T. 10/17/18, p. 40.

Petitioner testified her computer skills were limited before she began undergoing vocational rehabilitation. She could "surf" the Web, to buy things for her children, but did not use a computer much. T. 10/17/18, p. 29. Her children were born in 1984, 1989 and 1995. T. 10/17/18, p. 30.

Petitioner testified that, due to her work accidents, she underwent an anterior cervical discectomy and fusion at C4-C5 and C5-C6 in 2002, the same surgery at C3-C4 in 2003, a repeat surgery at C5-C5, with insertion of an interbody prosthetic device, in 2006 and a repeat surgery at C6-C7 in March 2015. T. 10/17/18, p. 32.

Petitioner testified she has smoked between a half a pack and two packs of cigarettes per day for about 40 years. She has attempted to stop smoking on a number of occasions, in connection with her spinal surgeries and at other times. Those attempts were ultimately not successful. T. 10/17/18, pp. 33-34. She again tried to stop smoking during the vocational rehabilitation process. At no point did Respondent offer to enroll her in a smoking cessation program. T. 10/17/18, p. 34.

Petitioner testified to a multitude of non-work-related health problems. In approximately 1995 or 1997, she underwent gall bladder surgery along with a stomach stapling procedure. T. 10/17/18, pp. 31-32. In 2011, at some point after the January 3, 2011 accident, she had a heart attack and underwent surgery at Cook County/Stroger Hospital to have stents inserted. PX 7. She continues to see a cardiologist on a regular basis. T. 10/17/18, p. 35. She takes medication for angina, high cholesterol and hypertension. On a daily basis, she suffers from heart palpitations and shortness of breath. T. 10/17/18, p. 37. In 2016, Dr. Rosania, her pain management physician, prescribed a cane for her because her walking was unstable. Her right leg would drag or give out. T. 10/17/18, pp. 37-38. In March 2018, her right leg gave way but her left leg remained where it was. As she started to fall, she sustained a left leg fracture and torn meniscus. She underwent care at Cook County/Stroger Hospital and Loyola. PX 5, 7. She saw Dr. Anderson at Loyola. She was unable to walk for days. She required a brace but not surgery. Dr. Anderson prescribed an MRI for her knee but she was not able to afford this. T. 10/17/18, pp. 39-40. She developed activity-related urinary incontinence due to the 2011 accident. She went in for a pelvic floor examination but was unable to afford additional testing that the doctors recommended. Workers' compensation denied the incontinence-related care. T. 10/17/18, p. 41. She has health insurance but is unable to meet the co-payments. T. 10/17/18, p. 43.

Petitioner testified she has experienced stress due to her inability to work. She worked throughout most of her adult life. Dr. Rosania recommended she see a psychiatrist. She is scheduled to see one at Cook County/Stroger in December 2018. T. 10/17/18, p. 43.

Petitioner testified her general physician, Dr. Sturnan, diagnosed her with irritable bowel syndrome in 2010. She also has GERD. She takes medication for these conditions. She was also diagnosed with chronic obstructive pulmonary disease and used an inhaler for a while. T. 10/17/18, p. 44. She suffers from bronchitis, for which she takes antibiotics. T. 10/17/18, p. 44.

Petitioner testified she took Opana for pain twice daily for a couple of years but stopped in early 2018, after the drug was reclassified so as to be used exclusively by cancer patients. She still takes

Norco three times daily along with Flexeril. She uses a Voltaran cream on her neck, shoulders, back and knees. She takes Lunesta when she is unable to sleep. She also takes a medication that prevents fluid retention. T. 10/17/18, pp. 47-49. She also takes Topamax for nerve pain in her legs. She also uses two TENS units, one of which is portable. T. 10/17/18, pp. 50-51.

Petitioner testified the intensity of her pain varies, depending on her activity level. The medication she uses numbs the pain and gives her "room to function." If her pain level is 7/10 on a particular day, the medication reduces it to 5/10. She typically hovers around a 6 ½-7/10 pain level.

Petitioner testified some of the medications she takes make her vision blurry while others make it difficult for her to breathe. The Topamax causes "anal leakage." Other medication makes her dizzy or affects her speech processing. T. 10/17/18, pp. 53-54. She tried to avoid taking medication during her visits to Vocamotive to keep her mind clear. This would cause her to be in pain until she got home. T. 10/17/18, p. 55. She sleeps for only 2 to 3 hours at a time. It is a good night if she sleeps for 4 hours at a time. T. 10/17/18, p. 55.

Petitioner testified she lives with her two sons. They do "most of everything" in the way of household tasks. One of her sons applies an ultrasound wand to her back to ease her pain. T. 10/17/18, pp. 51, 55.

Petitioner testified she first met with Joseph Belmonte of Vocamotive in October 2016. Mr. Belmonte interviewed her at her attorney's office. She provided him with her educational and work history. He explained the vocational rehabilitation process to her. Thereafter, she would typically see him once a month at Vocamotive. When she first started going to Vocamotive, she underwent computer education with Christine. This lasted about four months. She learned to use Microsoft Excel and Word, programs she was not previously familiar with. T. 10/17/18, pp. 58-59. Her Vocamotive transcript (PX 9) reflects she scored an "A" on Excel Basic and Outlook and a "B" on Windows 7 and Word Basic. T. 10/17/18, pp. 60-61. She then transferred to Vocamotive's job search program and began meeting with Rebecca Hanna. T. 10/17/18, p. 62. Each week she received a list of jobs, some of which she was required to apply to. It turned out that some, sometimes half, of the listed jobs were no longer available so she also looked for other jobs on her own. T. 10/17/18, pp. 62-63. She helped create one resume. PX 10. T. 10/17/18, p. 65. Unbeknownst to her, Vocamotive prepared a second resume. In her opinion, this second resume "inflated" her qualifications. T. 10/17/18, p. 66. She spent fifteen months applying for jobs. She went to Vocamotive's offices two days per week and looked for work from home on the other days. She was required to make 40 contacts per week. A "contact" could be a phone call, a mailed letter and resume or an online application. She kept a "phone log" and exceeded the required 40 contacts. She made anywhere between 50 and 60 contacts per week. T. 10/17/18, p. 92. In the log, she would write down the job she applied for, the messages she left, etc. She turned in a log each week. T. 10/17/18, pp. 83-84. At the beginning, she met with Joseph Belmonte monthly, to review her progress. Later Hanna also met with her and Belmonte. Belmonte always told her she was not doing well enough. T. 10/17/18, pp. 67-68. There were occasions on which she cancelled her scheduled days at Vocamotive. On some occasions, she had to cancel because Respondent required her to go to the eleventh floor of City Hall once a week to turn in job search paperwork. T. 10/17/18, p. 123. If she had to park her car, it could take up to two hours to turn in the paperwork. She was not allowed to mail it in. T. 10/17/18, pp. 124-126. She usually went to City Hall on Monday but, if a holiday fell on a Monday, she had to go on Tuesday instead. If she failed to turn in the paperwork, she would be fired. T. 10/17/18, pp. 72-73. She identified PX 8 as a group of the job search logs she turned in to Respondent. T. 10/17/18, pp. 72-73. On some other occasions, she cancelled at Vocamotive due to

health problems. On one occasion, in January 2017, she cancelled due to a dental emergency. She provided Vocamotive with an excuse from her dentist. PX 13. Vocamotive did not have a problem with her switching her days. In fact, Vocamotive changed her schedule to accommodate its own employees on some occasions. T. 10/17/18, p. 75. It was common practice to "swap out" days. T. 10/17/18, p. 76. Vocamotive had a handbook indicating that while students were expected to attend appointments as scheduled they could contact an instructor to reschedule in the event of illness or some other circumstance. T. 10/17/18, pp. 76-77.

Petitioner testified that Vocamotive was intent on her learning an accounting-related QuickBooks computer program. She had some accounting experience in the past but not with QuickBooks. Vocamotive signed her up for a two-day seminar. She attended this seminar, which was held at a motel on the south side. The seminar was not for beginners. Its purpose was to allow accountants who needed continuing education credits to familiarize themselves with a new, updated QuickBooks program. She asked questions at the seminar. The instructors told her she needed to use instructional discs but these discs cost hundreds of dollars. She showed the paperwork concerning the discs to Belmonte but Vocamotive did not purchase them. Belmonte indicated that maybe his own accountant could come out to provide assistance to Petitioner. The accountant never came. She attempted to learn QuickBooks on her own by checking out two books from the public library. She worked her grade up from the low 50s to the 80s and 90s but there were two inputting-related sections she still needed help with. She took a QuickBooks examination at a college on December 6, 2017, after attempting to educate herself. She failed this test because she "wasn't ready." She was "forced into" taking the test without being adequately prepared. T. 10/17/18, p. 97. She told Belmonte she was not ready but he told her to take the test anyway. He indicated that if she failed, they would know what she needed help with and she could re-take it later. T. 10/17/18, pp. 80-82. After she failed, Belmonte again said he would get his accountant to help her but he did not do this. At the same time, however, he said, "but Christine never needed help, why do you?" T. 10/17/18, p. 82.

Petitioner testified that, on some occasions, Vocamotive employees submitted applications on her behalf without telling her. She asked Hanna to tell her about these submissions because she would get calls on her cell phone and have no idea who was calling her or why. T. 10/17/18, p. 85.

Petitioner testified that Belmonte told her to not take her cane to job interviews. He also "attacked" her for smoking. He said she went to an interview wearing a scarf that smelled of smoke. She understands that some individuals are sensitive to the smell of smoke. She kept Febreze in her car and would spray it on herself before she went in for an interview. Belmonte also told her to remove her nose ring and some of her earrings. She had worn a nose ring since before she started working for Respondent. In response to Belmonte's comments, she "toned down" her appearance by putting in a smaller gauge nose ring and wearing smaller earrings. T. 10/17/18, p. 88.

Petitioner testified she continued looking for jobs for fifteen months. She believed she was diligent during this period. She wants to work in some capacity, to the best of her ability, given her medical problems. She interviewed via phone for a customer service job with a representative of Parts Town. This job was not offered to her. She interviewed for another job and later learned the company was looking to hire someone younger. She interviewed for a hotel job at 9 PM because that was the only time the interviewer was available. T. 10/17/18, pp. 90-91. She met with Hanna at the end of each week to do a count of her contacts. Hanna did not express displeasure with the efforts she was making. T. 10/17/18, p. 93. Hanna would tell her about any applications she submitted on Petitioner's behalf. Petitioner would routinely ask Hanna if Belmonte had made any efforts to have his accountant come out

and help her with QuickBooks. Hanna would say, "I'll ask him again" and then later tell her "no." T. 10/17/18, p. 94. She did not receive Belmonte's monthly reports. T. 10/17/18, p. 94. She applied for a front desk agent job at Crowne Plaza in Burr Ridge. No one ever told her she did not meet the physical requirements of the job. T. 10/17/18, p. 94. She interviewed with a "Mr. Kasumovic" of S & L Cartage. A Vocamotive representative told her this interview went very well. No one ever told her Kasumovic decided to hire a younger candidate. T. 10/17/18, p. 95. She did not tell any prospective employers she planned to work only a few more years. T. 10/17/18, p. 96. No one from Vocamotive told her that an interviewer told them she said this.

Petitioner testified that Dr. Rosania requested injections for her so that she could decrease her oral pain medication. The last injection was administered before her last surgery. Dr. Rosania recommended another injection thereafter but it was not authorized. The "nurse advocate" who attended appointments with her told her she would pursue this but the injections were always denied. T. 10/17/18, pp. 99-100.

Petitioner testified she returned to Dr. Ghanayem in November 2017 because her lower back and leg pain had increased and she was falling. Dr. Ghanayem recommended an MRI but Respondent would not approve it. PX 5. She could not pay for it. She has health insurance but the group carrier would not pay because it was "workers' comp." T. 10/17/18, pp. 100-101.

Petitioner testified she has continued looking for work since March 2018. She primarily looks online but will stop by a business if she sees an opening. She stopped in at two Public Storage locations and saw different managers. One was looking for a bookkeeper. She completed an application online and dropped off her resume but did not hear back. T. 10/17/18, pp. 102-103. She was not familiar with the program the facility used. T. 10/17/18, p. 103. She checks for jobs on a "pretty much" daily basis. She has continued sending out her original resume on a weekly basis. T. 10/17/18, pp. 101-102.

Petitioner described herself as a "fair" reader. She has never timed herself. She "pretty much" comprehends what she reads. When her typing speed was last tested, she was typing at a rate of around 35 words per minute. T. 10/17/18, p. 105.

Petitioner testified she would consider herself hard working. During the time she worked for Respondent, she was never disciplined for being lazy or failing to show up. T. 10/17/18, pp. 105-106.

Under cross-examination, Petitioner acknowledged signing agreements when she enrolled at Vocamotive on November 17, 2016. She read the Vocamotive handbook later on. She was aware of Vocamotive's policies concerning absences and tardiness. T. 10/17/18, p. 107. She identified RX 6 and RX 7 as documents relating to the trucking business she and her ex-husband operated. This business has not been active for over a decade. After the divorce, her ex-husband "flipped the truck" and began working for a company. During the time they operated the business, she kept track of the fuel because they had to pay fuel taxes. T. 10/17/18, p. 111.

Petitioner denied receiving a copy of RX 9, a letter from Respondent indicating it was suspending her benefits due to non-compliance. T. 10/17/18, p. 112. The letter bears her address but she did not receive it. She currently drives her personal van as necessary. She currently uses her home computer to send out resumes. T. 10/17/18, pp. 112-113. She bought a cane on her own because she was having balance issues. Dr. Rosania said the cane was a good idea. Vocamotive told her she could not use the cane unless she had a doctor's note, which she obtained. T. 10/17/18, pp. 113-114.

On redirect, Petitioner identified PX 4 as a prescription dated November 18, 2017 for a cane for "mobility and steadying." T. 10/17/18, p. 115. She and her ex-husband operated the trucking business before she began working for Respondent. She accompanied her husband on long distance trips and would act as a replacement driver when he needed to sleep. T. 10/17/18, pp. 115-116. After the divorce, her ex-husband continued operating the business for a short period of time. Since she handled bookkeeping for the business, she wanted to pursue this kind of work through Vocamotive but "they always led towards dispatcher" jobs. Based on the lists she received each week during the job search process, she could see she was being directed to customer service jobs, a lot of which were at hotels. Vocamotive also "pushed [her] off" to employment agencies rather than directly helping her look for work. T. 10/17/18, p. 120. Petitioner acknowledged signing RX 5, Vocamotive's enrollment agreement, but denied having time to review the entire document. She was given a "quick run through" and told "sign now or we go no further." T. 10/17/18, p. 121.

Joseph Belmonte, a certified vocational rehabilitation counselor, testified on behalf of Respondent. Belmonte testified he obtained certification in 1992. He recertifies every year with 100 hours of continuing education. T. 10/17/18, pp. 131-132. He is the president of Vocamotive, a company that provides a wide range of vocational rehabilitation services. T. 10/17/18, pp. 129-131. About 60 to 65% of the referrals he receives are from claimants. T. 10/17/18, p. 129.

Belmonte testified he first met with Petitioner, at her attorney's office, on August 30, 2016. The meeting lasted two hours. During that time, he asked Petitioner about her education, work and medical history, restrictions, computer proficiency, medication usage and emotional status. Petitioner told him she felt depressed. Petitioner also relayed that her cardiologist had recommended she undergo a psychological evaluation. T. 10/17/18, p. 143. Petitioner began crying when he asked her whether there was any suicidal ideation. T. 10/17/18, pp. 143-144. Petitioner indicated she owned an older desktop computer and was able to "hunt and peck" on the keyboard. Petitioner denied having any experience with office software. She also denied having a resume or familiarity with job search websites. She indicated she was able to speak both Serbian and Yugoslavian. T. 10/17/18, p. 147. She relayed that she had started working for Respondent in 1996 but had no clerical or administrative duties.

Belmonte testified that, after gathering data from Petitioner and reviewing her medical records, he used a computer-based system called "OAYSIS" to target possible occupations. He relied on Dr. Ghanayem's August 10, 2015 opinion that Petitioner is subject to permanent light duty restrictions. T. 10/17/18, pp. 160-162. He concluded that Petitioner could perform certain light driving-related jobs or could be retrained to develop keyboard proficiency and computer literacy sufficient to direct her to administrative, clerical, dispatching or customer service jobs. He opined that, with no further interventions, Petitioner would probably have an earning potential of between minimum wage and $12 per hour and, that "with the development of keyboard proficiency and Microsoft Office literacy, that could be expanded to $16 per hour." T. 10/17/18, p. 163. He recommended vocational rehabilitation interventions, including testing, job-seeking skills instruction, keyboard and computer software training, job development and supervision of the job search process. He prepared a report in which he set forth his opinions and recommendations. T. 10/17/18, p. 164. His goal at that time was to return Petitioner to work within 120 to 180 days. T. 10/17/18, p. 165. He indicated that, once Petitioner "hit her stride," she should make 40 to 60 job contacts per week. T. 10/17/18, p. 168. He advised Petitioner of her obligations along these lines. It was his understanding that Petitioner agreed to participate in Vocamotive's program. After Respondent, the payor, approved his plan, he advised Petitioner's counsel

that Vocamotive's services had been authorized. He then set up an appointment for Petitioner to come to Vocamotive's offices. To his recollection, Petitioner met with Sharon Zajac, one of his employees, on November 17, 2016. Petitioner was supposed to come in on November 16th but reported hurting her back that day, while getting dressed. T. 10/17/18, p. 203. Vocamotive expects timely arrivals and enforces a minimum business casual dress code, consistent with what individuals would have to adhere to during a job interview. T. 10/17/18, p. 181. If a client needs time off to attend a medical appointment, he has to complete a form. T. 10/17/18, p. 181. Once the orientation is concluded, the client is handed off to the lead computer trainer and is assigned a loaner laptop. The loan is conditioned on the client caring for the equipment and only using it for legitimate purposes. T. 10/17/18, p. 182. The client also receives a security badge. An E-mail account is established. T. 10/17/18, p. 203. Vocamotive has a set curriculum, since it operates as a vocational school. A client undergoes 30 clock hours of Microsoft Word training and has to pass certain tests in order to receive a certificate of completion. T. 10/17/18, p. 183.

Belmonte testified he recommended that Petitioner undergo vocational testing. He referred Petitioner to James Boyd for this purpose. T. 10/17/18, p. 186. He wanted to have an idea of Petitioner's reading and writing skills as well as her ability to follow oral directions and perform clerical tasks. T. 10/17/18, p. 188. He identified RX 2 as the report Boyd prepared. The testing revealed that Petitioner is a "solid reader with sentence comprehension and word reading capabilities, well into the 11th grade level and above." She is able to read the kind of material one would encounter while attending junior college. T. 10/17/18, p. 192. She displayed no cognitive impairment and no reading disability. Petitioner also exhibited strong math skills, strong customer service aptitude, good visual and spatial skills, good bilateral manual and fine motor dexterity skills and "solid insight into the nature of interpersonal relationships." T. 10/17/18, p. 194. The only vocational liabilities noted were spelling skills at an 8.9 grade level and below average clerical perception with alphabetic information. Boyd's report did not prompt him to revise his original rehabilitation plan. T. 10/17/18, p. 195.

Belmonte testified that, once a client finishes the computer training phase, he begins the job search phase, which includes formulating a resume, building job seeking skills, attending job search workshops and similar activities. T. 10/17/18, p. 196.

Belmonte identified RX 2 as a collection of the monthly progress reports that Vocamotive issued in Petitioner's case through March 6, 2018. T. 10/17/18, pp. 197-198. He requires his employees to document all encounters they have with clients. These "case notes" are reviewed each month. He adds an analysis section to each monthly report that is issued. T. 10/17/18, pp. 199-200. The first monthly report in Petitioner's case was issued on January 25, 2017. T. 10/17/18, p. 201. Zajac drafted it and he added an analysis section. T. 10/17/18, pp. 201-202. His signature should have appeared on this report but it does not. That was a mistake. T. 10/17/18, p. 202. Belmonte testified that, when Petitioner first came in, on November 17, 2016, she was advised to remove multiple earrings and a nose ring. Petitioner reported using a cane. Petitioner indicated the case was not prescribed but she would ask her doctor about it. She was given logs so that she could track her mileage between her home and Vocamotive's office. She agreed to undergo vocational testing, which was then scheduled for December 8, 2016. Petitioner initially keyboarded at a rate of 12 words per minute. Petitioner subsequently called in from home, reporting some difficulty using her assigned computer. This was "not unusual." T. 10/17/18, p. 207. After participating in additional tutorials, Petitioner increased her typing speed to 16 words per minute by December 1, 2016, but was seen crying at her desk that day and left Vocamotive ten minutes early. Petitioner continued to progress thereafter but became ill. The vocational testing had to be rescheduled to December 21, 2016. Petitioner scored 92% on a Windows 7 basics

examination and continued to increase her keyboarding speed. Petitioner was up to 19 words per minute by December 20, 2016 but arrived late that day after reporting involvement in an automobile accident. T. 10/17/18, p. 210. Petitioner had fallen behind by early January 2017 but "did catch up." T. 10/17/18, p. 211. He did not personally meet with Petitioner during this period. He continued to feel Petitioner was employable. T. 10/17/18, pp. 213-214. Issues with Petitioner's nose ring arose again in late January 2017. Although the nose ring "wasn't too obtrusive," he recommended that Petitioner "not wear that thing." Petitioner "agreed to comply." T. 10/17/18, p. 216. Petitioner failed to attend the third day of a job search workshop, due to a dental emergency. She produced a note from her dentist along with a prescription for her cane and a recommendation she take "stretch breaks" every hour while undergoing instruction. T. 10/17/18, p. 216. There were "consistent issues with attendance and timeliness." T. 10/17/18, pp. 216-217. Petitioner fell behind again in February 2017 and did not respond to his recommendation that she complete ADA paperwork requesting a reasonable accommodation from Respondent. T. 10/17/18, p. 219. By March 2017, Petitioner "had made progress with keyboarding and had actually pretty good accuracy." T. 10/17/18, p. 223. If Petitioner had "called off" in a work setting to the extent she was "calling off" at Vocamotive, she would not have maintained employment. T. 10/17/18, p. 224. He perceived Petitioner as making "somewhat resentful responses" to his recommendations. T. 10/17/18, p. 229. Regardless of which days Petitioner was scheduled for, they were still struggling with "about 50 percent missed time." He understood that Petitioner had health problems but felt that, at the end of the day, she had to show up. He discussed attendance issues with Petitioner via telephone on March 16, 2017 and indicated he could not recommend the continuation of services. T. 10/17/18, p. 232. He came to the Commission on April 25, 2017, for purposes of a pre-trial. After the pre-trial, it was determined that vocational services would resume, with the understanding Petitioner would comply fully. Vocational rehabilitation was reinstituted on May 2, 2017. The goals remained the same. Petitioner was to conclude computer training and proceed into job search mode. Petitioner "did well" on her Microsoft Outlook Basic final examination and then the job search process began. At this point, "a lot of the attendance issues disappeared." T. 10/17/18, p. 237. In July, he was looking at implementing the QuickBooks training. The training was available on July 10 and 11. He sought approval for payment from Respondent. T. 10/17/18, p. 238.

At a continued hearing, held on January 17, 2019, Belmonte testified that Petitioner did attend the QuickBooks course and presented Vocamotive with a certificate of completion. On July 13, 2017, he met with Petitioner to discuss her concerns about the course. He recommended she watch videos on the website, take practice quizzes and "apply herself." T. 1/17/19, p. 17. Between August 7 and September 7, 2017, he felt Petitioner was actively participating in vocational rehabilitation. T. 1/17/19, p. 19. On September 19, 2017, he met with Petitioner to express his concern that she "get on" with the QuickBooks test. Petitioner told him she had not passed the mock quizzes and "did not want to be set up to fail by Vocamotive." T. 1/17/19, pp. 23-24. As a "compromise," he recommended that his employee, Ms. Hanna, work with Petitioner concerning the mock quizzes. In October 2017, he again met with Petitioner. She told him she wanted to focus on studying for the test but he advised her "she needed to learn to schedule her activities to keep moving on all fronts." At that point, Petitioner was devoting two days per week to study. T. 1/17/19, p. 27. Petitioner was continuing to look for work and participate in interviews during this period. T. 1/17/19, p. 28. He scheduled an interview at Roto-Rooter, where one of his former employees worked. The interview was for an entry level dispatch opening. Following the interview, one of his employees called to follow up with that former employee. Roto-Rooter did not offer Petitioner a job. T. 1/17/19, p. 37. He then counseled Petitioner, telling she "should be more careful" to attend to her appearance and presentation. Petitioner told him she sprayed Febreze on herself to try to eliminate the smell of smoke. Petitioner also related that, while she had a scarf wrapped around her head on arrival at Roto-Rooter, she pulled it down during the interview.

T. 1/17/19, p. 38. He advised Petitioner to try to "sell herself" as best she could. He felt Petitioner was capable of this. T. 1/17/19, p. 40. He was "not happy" with the progress at that point. Petitioner was delaying taking the QuickBooks test. T. 1/17/19, pp. 41-43. Petitioner took the test on December 6, 2017, but did not pass it. She scored 532 out of a possible 700. Petitioner "performed best with the basic accounting section" at 80 percent and "lowest in the QuickBooks set-up section" at 33 percent. He remained concerned about Petitioner's cane usage, "irritability upon receipt of coaching" and "objections to the QuickBooks training process." He contemplated starting the QuickBooks study process over again, with the involvement of a tutor, but was upset about the delay preceding Petitioner's taking of the test. T. 1/17/19, p. 51. He still considered Petitioner to be prospectively employable. T. 1/17/19, p. 52.

Belmonte testified that by February 2018 Petitioner had not set up an appointment to re-take the QuickBooks test. He does not know why. Petitioner asked for a tutor and he "advised her that tutoring was not authorized." He was "now reluctant to continue to support her efforts in this regard" given the delay preceding the first test. T. 1/17/19, p. 56. In his report of February 19, 2018, he recommended that vocational services be stopped. T. 1/17/19, p. 59. In a final progress report, dated October 1, 2018, he noted that Petitioner had failed to return the loaner Vocamotive laptop along with a connective device. T. 1/17/19, pp. 62-63. RX 10. "It took months" for Petitioner to return this equipment.

Belmonte identified RX 4 as a labor market survey he prepared in these claims. He relied on Dr. Ghanayem's light duty release in preparing this survey. Based on the results of the vocational testing and Petitioner's achievements with respect to keyboarding and computer proficiency, he identified a variety of clerical jobs in different settings. He contacted fourteen prospective employers and identified a range of hourly wages varying from $10 to $20. T. 1/17/19, pp. 65-67. He believes a range of $13 to $16 per hour to be "reasonable." T. 1/17/19, p. 68.

Belmonte identified RX 12 as a "professional disclosure form" in which he disclosed his ethical obligations to Petitioner. In the form, he disclosed that he reports to people who pay for his services and that "there are certain accountabilities in place." He also disclosed that a failure to cooperate can result in termination of benefits. T. 1/17/19, pp. 69-71. He reviewed this form with Petitioner. Petitioner agreed to comply. Both he and Petitioner signed the form. T. 1/17/19, pp. 71-72.

Under cross-examination, Belmonte acknowledged he eventually received most of the loaner equipment back from Petitioner. T. 1/17/19, p. 73. Respondent hired him and paid him. He cannot recall whether he told Petitioner she could choose her vocational rehabilitation provider. T. 1/17/19, pp. 74-75. He provides services in other cases involving Respondent. He charges $105 per hour for the work he performs. Some of his staff members have lower hourly rates. He would estimate that Vocamotive's bill in Petitioner's claims is between $25,000 and $30,000. T. 1/17/19, p. 75. Vocamotive first provided services to Respondent about five years ago. Then there was a "slow ramp up." Until a year and a half ago, when a significant decline began, he was involved in 15 to 20 cases per year for Respondent. T. 1/17/19, p. 76. He cannot deny that Respondent is a "pretty good account" to have. Not everyone returns to work. Some clients elect to settle. Sometimes the payor will instruct him to close his file, for reasons that are not disclosed. Some clients resume medical care. Others obtain full duty releases or fail to cooperate. Admittedly, there are individuals who fail to return to work, "despite their best efforts." It is extremely important to know a claimant's physical and mental condition before instituting a plan. T. 1/17/19, p. 81. Age has always been an issue but cannot be viewed in isolation. The average age of claimants referred to Vocamotive is 50. T. 1/17/19, p. 85. Vocamotive supports

computer literacy. The job application process is now computer-based. He was aware of Petitioner feeling she was under a lot of stress but he did not inquire as to any psychological conditions. T. 1/17/19, p. 90. He was aware of Petitioner's medications, including Opana and Norco, and the potential for side effects, although he is not a physician. T. 1/17/19, pp. 91-93. With respect to Dr. Ghanayem's records, he reviewed only one page, namely the note in which the doctor recommended restrictions. T. 1/17/19, p. 95. He knew Petitioner underwent cervical spine surgeries but he is not sure how many surgeries she had. A surgical history, in and of itself, does not define disability. His job is to coach clients, not embarrass them. He never recommended that Respondent offer to enroll Petitioner in a smoking cessation program. T. 1/17/19, pp. 99-100. He did not tell Petitioner to throw her cane away. He told her he would prefer her to present documentation supporting the need for the cane. Being out of work can cause anxiety and depression. T. 1/17/19, p. 103. In a general sense, he frowns upon clients discussing their medical conditions with prospective employers. Employers are in fact prohibited from asking certain questions regarding disabling conditions. T. 1/17/19, p. 105. He advises clients to "not volunteer information that an employer is prohibited from asking." T. 1/17/19, pp. 106-107. A client who reveals she has had multiple surgeries, is on medications and has psychological problems is not handling things in the best way. T. 1/17/19, p. 107. He does not believe this happened in Petitioner's case. T. 1/17/19, p. 108. He is not aware of Petitioner having incontinence problems. T. 1/17/19, p. 110.

Belmonte testified he has used James Boyd for testing purposes hundreds of times. He relied on Boyd's report in these claims. He did not send a full complement of medical records to Boyd. T. 1/17/19, p. 112. He did not request updated medical records during the period he worked with Petitioner. T. 1/17/19, p. 114. He assumed that the parties would provide him with these records. He has no reason to dispute Boyd's statement that Petitioner "was very motivated to return to work." T. 1/17/19, p. 117. Even motivated individuals can become depressed when they fail to make progress in securing work. It could be stressful to go from earning $32 to $33 per hour to significantly less. T. 1/17/19, p. 118. He has no information indicating that Petitioner suffered a heart attack. T. 1/17/19, p. 125. He also does not recall Petitioner sustaining a leg fracture. T. 1/17/19, p. 126. He is not a physician but would agree Petitioner has a significant number of co-morbidities. T. 1/17/19, p. 128. Potentially disabling conditions that pre-date a work accident do not necessarily prevent a person from being employable. T. 1/17/19, p. 130. He is aware that Petitioner submitted job search records to Respondent but "would have to look at the records to determine whether some of what she submitted was a duplication of efforts that [Vocamotive] was already making." T. 1/17/19, p. 132. Between May 23, 2017 and March 2, 20818, Petitioner documented almost 500 job contacts. He would not expect that Petitioner would engage in job search efforts 24 hours per day, 7 days per week. T. 1/17/19, p. 134. Per Vocamotive's policies, Petitioner had the right to reschedule appointments. Before Petitioner met with the Arbitrator, she had an approximate 50% attendance issue. T. 1/17/19, p. 142. Petitioner did make up some of the time she lost.

Belmonte acknowledged that the QuickBooks training was an issue he had with Petitioner. He also acknowledged that some of the jobs he identified for Petitioner would not have required familiarity with QuickBooks. T. 1/17/19, pp. 144-145. Since Petitioner had a remote history of accounting, he felt they could prospectively capitalize on that. In his opinion, the course Petitioner attended was not geared to accountants. T. 1/17/19, p. 146. He did not authorize tutoring when Petitioner first requested it. He wanted Petitioner to "finish the class and take the first test." Whether or not Petitioner needed tutoring would depend on whether she passed the test. T. 1/17/19, p. 147. He has had other clients as well as employees take the QuickBooks test. Before Petitioner, he has not had anybody fail. T. 1/17/19, p. 148. Petitioner reported 59 job-related contacts between July 14 and 21,

2017. At Vocamotive's direction, Petitioner presented for a job interview in June 2017 but, on arrival, was told no one knew about it. T. 1/17/19, p. 153. Petitioner participated in two phone interviews on June 28, 2017. Petitioner reported 37 job-related contacts for the week beginning July 7, 2017 and 59 contacts for the following week. Petitioner expressed frustration with QuickBooks self-study at this time but no tutoring was provided to her. T. 1/17/19, p. 158. Petitioner participated in three interviews in August 2017 but was not hired. She was making an effort. T. 1/17/19, p. 162. Belmonte agreed that, with the advent of identity theft, it would not be prudent for someone to disclose his Social Security number over the telephone. T. 1/17/19, p. 162. However, if the number was going to be submitted to a secure website, that would be safe. T. 1/17/19, pp. 162-163. On December 18, 2017, Petitioner reported that one of her legs was giving out. Belmonte testified he has clients who "complain about pain all the time." Around Thanksgiving 2017, Belmonte expressed concern about Petitioner smelling of cigarettes. Petitioner responded she was aware of this and using Febreze. Belmonte acknowledged he did not advise Petitioner to quit smoking. Nor did he arrange for her to enter a smoking cessation program. It was up to Petitioner to rectify the problem. One option was for her to take a set of clothes to the dry cleaners and then keep that set isolated from the rest of her wardrobe. T. 1/17/19, pp. 165-167. Febreze was another option but it was "not working." T. 1/17/19, p. 168. Petitioner interviewed at Parts Town. The interviewer sent her a communication indicating that while her background was "strong" they decided to go with other candidates. T. 1/17/19, pp. 168-169. Petitioner interviewed at Crowne Plaza in Burr Ridge on January 17, 2018. Thereafter, someone affiliated with Vocamotive spoke with Mrs. Zemaitis, the individual who interviewed Petitioner. Zemaitis described Petitioner's interviewing skills as "very good" but expressed concern as to whether Petitioner would be able to meet the physical requirements of a front desk agent job, since front desk agents were required to stand throughout their shifts and walk down long hallways. T. 1/17/19, pp. 173-174. Another person who interviewed Petitioner described her as "knowing her stuff" but indicated he wanted to go with a younger candidate who he could train. T. 1/17/19, pp. 174-175. Petitioner reported she was not hired by American Transport or Chicago Marriott. The interviewer at Chicago Marriott told her she might be better suited for an office position but no such position was available at that time. T. 1/17/19, p. 175. Petitioner also applied to the Palmer House hotel but nothing came of that. T. 1/17/19, p. 176.

Belmonte acknowledged that Petitioner again requested QuickBooks tutoring in February 2018. He did not grant that request. He told Petitioner to reschedule the re-test. T. 1/17/19, p. 179. At one point, he had agreed to have his own accountant tutor Petitioner but this never happened. T. 1/17/19, p. 179.

Belmonte conceded that Petitioner made hundreds of job-related inquiries and obtained numerous interviews. T. 1/17/19, pp. 180-181. Some of the people who interviewed her gave positive feedback. T. 1/17/19, p. 181. Petitioner continued making contacts in February 2018. When he told Petitioner he was going to recommend that Vocamotive stop providing services, she asked why, citing the number of contacts she was making. T. 1/17/19, pp. 183-184. He did not discuss his reports or opinions with Respondent's adjusters. T. 1/17/19, pp. 185-186.

Belmonte conceded he has not calculated the number of times Petitioner missed an appointment at Vocamotive and did not make up the lost time. If Petitioner testified she always made up the absences, he would not be able to disagree. T. 1/17/19, pp. 187-188.

On redirect, Belmonte testified he attempts to avoid any conflicts of interest and remain unbiased, regardless of who retains his services. He would have continued to bill Respondent had he not recommended that Vocamotive discontinue assisting Petitioner. T. 1/17/19, p. 192. He had nothing

to gain financially from recommending that his services come to an end. T. 1/17/19, pp. 192-193. The job logs from Respondent have not prompted him to change any of the opinions he voiced in his reports. He has placed individuals who are older than Petitioner. T. 1/17/19, p. 194. Petitioner's reading and mathematical skills were consistent with the jobs he was targeting. T. 1/17/19, p. 196. He was aware that Petitioner felt stressed, based on her comments, but he never reviewed any psychological assessments. T. 1/17/19, p. 197. If a client of his was undergoing psychological treatment, he would expect the client to make him aware of this. T. 1/17/19, p. 198. If Vocamotive did not set a grooming standard, the clients would be "all over the map in terms of the way they show up." T. 1/17/19, p. 199. His job is to prepare clients to be as professional as they possibly can be. T. 1/17/19, p. 199. He is not in a position to order a client to do something. He simply tells the client what needs to be done and expects an adult response. T. 1/17/19, p. 200. He discourages clients from discussing their medical problems with prospective employers. T. 1/17/19, p. 201. He did not knowingly recommend that Petitioner apply for any job that exceeded her physical restrictions. T. 1/17/19, p. 202. He advises clients to be honest insofar as their restrictions are concerned. T. 1/17/19, p. 202. Any effort, whether it is a phone call, follow-up letter or resume transmittal, counts as a contact. T. 1/17/19, p. 204. Even though 59 contacts might be documented, that does not mean 59 employers were contacted. T. 1/17/19, p. 205. Numbers alone do not impress him. T. 1/17/19, p. 205. He recommended QuickBooks certification based on Boyd's test results and because Petitioner had some accounting experience from the past. T. 1/17/19, p. 206. The program Petitioner attended was not geared to accountants. It was an entry level program. Accountants may have attended it but he has had other people like Petitioner, who are high school graduates, go through the program. T. 1/17/19, p. 207. Passing the test would not have made Petitioner an accountant or skilled bookkeeper but it would have provided her with a basic understanding of the utilities of the program. T. 1/17/19, p. 208. It would not have cost anything extra for Petitioner to re-take the test. When you purchase the course, you get two shots at the examination. T. 1/17/19, p. 210. Petitioner was scheduled to appear at Vocamotive twice weekly and consistently missed one of the two days for various reasons. That became a problem. T. 1/17/19, p. 212.

Under re-cross, Belmonte testified that Petitioner's absences are documented in the monthly progress reports. T. 1/17/19, p. 215. He does not recall whether Vocamotive separately maintained attendance records. T. 1/17/19, p. 217. Vocamotive does utilize a form called "request for time off." Clients have to use a card to swipe in and out. Petitioner's absence rate was 50% at the beginning, during the computer training but this improved after "the discussion" [with the Arbitrator]. T. 1/17/19, p. 220. Certified public accountants utilize QuickBooks. Had Petitioner passed the test, she would have been "prospectively trainable to use the program." T. 1/17/19, p. 222. He did initially promise to obtain tutoring for Petitioner, via his accountant, but later decided not to do this because Petitioner "put off taking the test for so many months." T. 1/17/19, p. 223. The number of contacts Petitioner made was "not insignificant." T. 1/17/19, p. 226. It is not out of the realm of possibility that Petitioner made 1,000 contacts. T. 1/17/19, p. 227. He acknowledges Petitioner may have made other contacts documented on the sheets she submitted directly to Respondent. He has no way to estimate the number. T. 1/17/19, p. 229.

On further redirect, Belmonte reiterated that the fact a client makes 59 contacts does not mean he contacted 59 employers. T. 1/17/19, pp. 229-230.

Petitioner was recalled in rebuttal. Petitioner testified that the people who attended the two-day QuickBooks course with her were either accountants obtaining their continuing education hours or business owners who were upgrading to a new version of the software. The course was not for beginners. At the recommendation of Rebecca Hanna of Vocamotive, she went online after taking the

course to pursue links that provided tips as to QuickBooks usage. Some of these links were on YouTube. She could not pose any questions when pursuing these links. She also checked out two books from the library. She showed these books to Hanna, who reviewed them. Hanna started marking passages for Petitioner to read. By the end, Hanna had pretty much tabbed the entirety of both books. T. 1/17/19, p. 235. Before she took the test for the first time, she spent hours reviewing these books and going online. She asked Belmonte for help. Initially, he offered her four hours of tutoring, via his accountant. As she continued to ask for help, the number of hours he offered decreased. Eventually, she told him she needed less than an hour, because she had narrowed down the points she needed help with. She also asked Hanna and another employee to ask Belmonte to help her. She finally took the test in December, without obtaining any tutoring. Belmonte would not explain why he would not provide the tutoring. T. 1/17/19, p. 237. After she failed the test, a person at Moraine Valley told her there was a practice disc that Vocamotive could have obtained for her. She purchased this disc on her own, as she was leaving Moraine Valley, where the test was administered. The disc contained two practice tests. She showed the disc to Hanna and was able to "learn much more" by using it. She told Hanna she now needed only fifteen minutes with Belmonte's accountant to help her get to the end of the entry process, where she had to perform a function called "justifying." Vocamotive encountered a problem obtaining a voucher number that, on entry in a Certiport account, would have allowed her to re-take the test. It was Vocamotive, not Petitioner, that had paid for the course. Although Petitioner had a Certiport account, she could not use that account to obtain the voucher that would have allowed the re-test. The program asked for the original payor's credit cart information, which Petitioner did not have. This was never resolved. T. 1/17/19, pp. 240-242. Belmonte never characterized QuickBooks certification as just something to put on her resume. He told her it should lead to a career. When she went to Roto-Rooter for an interview, she initially met with Miss Freese, who had previously worked for Vocamotive. It was not Freese who interviewed her, however. A manager at Roto-Rooter interviewed her. T. 1/17/19, p. 243. She did miss days during the initial computer training period, sometimes because she had to drop off paperwork at City Hall on a Tuesday rather than a Monday, but made up those absences. She attended two days per week "unless [she] was seriously ill or couldn't move." T. 1/17/19, p. 244. She continued looking for work until Vocamotive terminated its services. She was ill, at home, and had called in to Vocamotive to report she was running late when a staff member told her to stay home. Later that same day she learned from Rebecca Hanna that she was no longer welcome at Vocamotive due to non-compliance. She asked how it could be that she was non-compliant when she was making "all these contacts." T. 1/17/19, p. 249.

Under cross-examination, Petitioner testified that, between failing the first test in November 2017 and March 2018, when she learned that rehabilitation was being suspended, she was trying to get Vocamotive to let her re-take the test. She expressed great interest in doing so. T. 1/17/19, p. 250.

Arbitrator's Credibility Assessment

The Arbitrator found Petitioner credible in 2012 and continues to view her as a believable individual who is motivated to work, despite serious spinal injuries requiring several fusions, significant restrictions and a multitude of non-work-related medical problems. The fact that Petitioner is seeking additional vocational rehabilitation speaks to her desire to re-enter the workplace. If her goal was to sabotage Vocamotive's efforts, as Respondent seems to contend, surely she would have sought a permanency award.

In assessing Petitioner's credibility, the Arbitrator notes that the 2015 functional capacity evaluation was valid. The evaluator found "no indication of symptom magnification." PX 5. The

Arbitrator also notes that Dr. Ghanayem, who has treated Petitioner for more than a decade, has never questioned the legitimacy of her complaints. He documented reliance on a cane, due to balance issues, as long ago as July 2014, several years before Vocamotive became involved in this case. PX 5. The Arbitrator further notes that James Boyd, who conducted vocational testing at Belmonte's request, described Petitioner as "neatly groomed," "very pleasant" and "very motivated to return to work." RX 2.

The Arbitrator has weighed Petitioner's very detailed testimony concerning her interactions with Vocamotive against that entity's monthly progress reports (RX 3). From the beginning, Belmonte criticized aspects of Petitioner's appearance and hygiene. Petitioner was somewhat slow to respond, having worn multiple earrings and a nose ring during her lengthy tenure with Respondent, but took the criticism to heart and modified her look. She did not quit smoking but, then again, was not offered any formal assistance with shedding this habit. She agreed to vocational testing and obtained good scores overall. She progressed through Vocamotive's initial computer training, albeit with some absences, scoring 90 percent on Excel Basic and 80 percent on Outlook Basic. Her keyboarding speed gradually increased over time, as Belmonte conceded. She missed appointments but made up some of the lost time by rescheduling, in accordance with Vocamotive's internal policy. Belmonte acknowledged she "did catch up." T. 10/17/18, p. 211. Some of the schedule changes resulted from Respondent's requirement that Petitioner appear at City Hall each Monday (or Tuesday, if Monday was a holiday) to submit job search documents. The irony of this is not lost on the Arbitrator. Petitioner credibly testified that some other appointments were rescheduled at the request of Vocamotive employees. The fact that Petitioner cancelled some sessions did not prevent her from obtaining interviews. Several prospective employers gave her glowing reviews. None offered her work.

Belmonte's qualifications are impressive and the Arbitrator has no quarrel with Vocamotive's overall approach. However, in this particular case, it appears Belmonte became fixated on Petitioner's appearance, smoking and cane usage, and remained fixated on the latter even after Petitioner obtained a formal prescription from Dr. Rosania. Belmonte and his employees took it upon themselves to question the need for the cane [see Vocamotive's progress report of December 18, 2017, p. 11]. It appears they were unaware of Dr. Ghanayem having documented balance issues and cane usage in 2014. Belmonte also drew negative conclusions concerning Petitioner's presentation from a former employee, rather than directly speaking with the individual [at Roto Rooter] who actually interviewed Petitioner. If an Illinois employer takes an employee as it finds him, as has long been held, a rehabilitation provider does as well. Not all employees are in good overall health, unfortunately. [See Bubak v. Murman, 02 IIC 891, a decision in which the Commission disagreed with the Arbitrator's finding of non-cooperation. The Commission noted that, while the claimant's non-accident-related heart condition may have played a role in his inability to find work, his accident-related spinal complaints also played a role and his tendency to focus on his poor health at interviews did not amount to non-cooperation. Also see Fricker v. Jewel, 97 IIC 2170, a case in which the Commission affirmed the Arbitrator's finding that a rehabilitation counselor is in the way of a medical provider whose duty is to the injured employee.] Moreover, there is no direct evidence indicating that the prospective employers who interviewed Petitioner declined to hire her because of her appearance or reliance on a cane. One expressed a preference for a younger candidate while another indicated she was concerned about Petitioner's ability to meet the physical requirements of a hotel desk agent job. Yet another praised her interviewing skills but opted to hire someone else.

The Arbitrator also concludes that Belmonte placed undue emphasis on Petitioner taking a QuickBooks course, through an outside vendor, and submitting to testing thereafter within the one-year

window allowed by that vendor. Petitioner credibly testified she found the course daunting and quickly realized it was meant for seasoned accountants already familiar with the QuickBooks software. Petitioner had done some bookkeeping in the remote past, but via ledgers, not computers. That she immediately alerted Vocamotive to her dilemma is borne out by one of the monthly progress reports. This report describes Petitioner as calling in during a break in the course to alert Vocamotive staff members to the fact the course was too advanced for her. After the course, Petitioner attempted to increase her understanding by studying books obtained from a public library. She took the test, regardless, but did not manage to pass. She credibly testified that Belmonte initially responded to her failure by promising to have his own accountant come to Vocamotive to provide instruction but that he later insisted she re-take the examination despite failing to make good on his promise. Belmonte corroborated Petitioner's very specific testimony on this point. T. 1/17/19, p. 179. To the Arbitrator, this was akin to putting the cart before the horse. Belmonte also questioned Petitioner as to why she did not pass on the first go-around, since other clients had managed to do so. T. 1/17/19, p. 207. Belmonte also failed to convince the Arbitrator that Petitioner would have been a more appealing candidate had she passed the test. Under cross-examination, he acknowledged that certification would not necessarily have opened doors for her, job-wise. It would have only made her "prospectively trainable." T. 1/17/19, p. 222. Petitioner lacked any recent accounting-related work experience and had already met Belmonte's original, reasonable goals of "keyboard proficiency and Microsoft Office literacy" (T. 10/17/18, pp. 163, 166). Belmonte testified he ultimately decided not to provide any tutoring because Petitioner was stalling in re-taking the test. Petitioner credibly contradicted that version of events on rebuttal. She was technically unable to obtain the voucher to re-take the test because she was not the original payor. She testified she made Rebecca Hanna of Vocamotive aware of this but the problem was not resolved. It appears to the Arbitrator there was a communication failure between Vocamotive's staff and Belmonte rather than deliberate stalling on Petitioner's part. Although the entire QuickBooks experience, which extended over weeks, left Petitioner feeling demoralized, she continued to look for jobs, as documented in Vocamotive's monthly progress reports and the other job search records.

Is Petitioner entitled to additional vocational rehabilitation? Is Petitioner entitled to maintenance from March 9, 2018 through the hearing of January 17, 2019?

Based on the foregoing credibility assessment, and the review of the documentary evidence, the Arbitrator concludes that, overall, Petitioner was not uncooperative with rehabilitation efforts. There were absence-related issues at the very beginning, prior to the April 25, 2017 conference, but those "disappeared" after the conference, by Belmonte's own admission.

Belmonte testified he continues to view Petitioner as employable. This, combined with Petitioner's expressed interest in returning to work, prompts the Arbitrator to award additional vocational rehabilitation but with a different vendor and for a period limited to nine months. The Arbitrator concludes that Petitioner and Vocamotive are at an impasse. There is Commission precedent for an award of limited duration. In Donald Margraff v. State of Illinois, 16 IWCC 833, a claim that also involved an allegation of non-compliance, the Commission upheld this Arbitrator's award of a six-month period of additional services to an older individual who had been out of the workforce for some time. The Arbitrator finds it reasonable to set a limit on additional rehabilitation in this case based on the duration of services provided to date, the number of years Petitioner has been off work and Petitioner's age. To avoid duplication of effort, Belmonte's initial assessment and the results of Boyd's testing should be made available to the new vendor. The Arbitrator recommends that the parties collaborate in the selection of this vendor. The focus should be on direct job search efforts without the use of

intermediaries such as employment agencies. Petitioner is directed to make herself available for appointments and interviews within a reasonable geographic area of her residence, to make every attempt to schedule non-accident-related medical and dental appointments on days she does not already have job-related commitments, to adhere to the provider's rules concerning computer usage and to keep detailed records of the contacts she makes.

The Arbitrator further finds that Petitioner is entitled to additional maintenance from March 9, 2018 through the hearing of January 17, 2019, with Respondent receiving credit for its recent payment of $3737.80.

Is Respondent liable for penalties and fees?

Although the Arbitrator views Petitioner as a candidate for additional vocational rehabilitation, and has awarded maintenance, she is unable to find that Respondent acted in an objectively unreasonable manner under all of the existing circumstances in terminating benefits as of March 8, 2018. Petitioner's claim for penalties and fees is denied.